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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNHARDT S. KRAMER, Commissioner,
Ulster County Department of Social
Services, et al.

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

The petitioners ask leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Leave to proceed in forma pauperis was sought and granted in the Supreme Court of the State of New York, Appellate Division, Third Department.

The petitioners' affidavit in support of this motion is attached.

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- against -

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services, et al.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

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QUESTION PRESENTED

Whether Section 622 of the Family Court Act of the State of New York is unconstitutional because it permits the Family Court to terminate parental rights on a finding of permanent neglect which is based upon a "fair preponderance of the evidence."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

- against -

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Petitioners, John Santosky II and Annie Santosky, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, entered on May 1, 1980, which unanimously affirmed an order of the Ulster County Family Court entered on April 5, 1979.

OPINIONS BELOW

The Family Court of the State of New York, Ulster County (Elwyn, J.), adjudged petitioners' three children permanently neglected and ordered that petitioners' parental rights be terminated. In the Matter of Tina Frances Apel, et al. (Opinion entered March 12, 1979 and attached as Appendix "B"; orders entered April 5, 1979, and attached as Appendix "C").

The Appellate Division, Third Department, affirmed the Ulster County Family Court. In the Matter of John AA, et al., ___ A.D.3rd ___, 427 N.Y.S.2d 319 (May 1, 1980). (Appendix "A").

Petitioners' appeal to the Court of Appeals was dismissed on September 16, 1980. In the Matter of Tina A., ___ N.Y.2d ___. (Appendix "D").

JURISDICTION

The New York Supreme Court, Appellate Division, Third Department, affirmed the Ulster County Family Court on May 1, 1980. Petitioners' appeal to the Court of Appeals was dismissed on September 16, 1980. This petition is timely filed within ninety (90) days of the date of the Court of Appeals' dismissal. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law....

Section 622 of the New York Family Court Act provides:

> Definition of "fact-finding hearing" - When used in this part, "fact-finding hearing" means in the case of a petition permanently to terminate custody a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of section six hundred fourteen are supported by a fair preponderance of the evidence.

STATEMENT OF THE CASE

On October 16, 1979, respondent Bernhardt S. Kramer, Commissioner of the Ulster County Department of Social Services, filed a petition in Ulster County Family Court alleging minors John Santosky III, Jed Conrad Santosky and Tina Frances Apel to be permanently neglected by petitioners, John Santosky II and Annie Santosky

Prior to trial, petitioners notified the Attorney General of New York, pursuant to Section 71 of the Executive Law, that they intended to assert at the hearing that the Family Court Act was unconstitutional in that it required a standard of proof for finding permanent neglect based on a "fair preponderance of the evidence" rather than upon "clear and convincing" evidence in violation of the Due Process Clauses of the United States Constitution, Amendment 14, and the New York Constitution, Article 1, Section 6. On January 2, 1979, the Attorney General responded that he would not appear in the hearing.

A fact-finding hearing was held in the Family Court, Ulster County on January 23, 26, 31 and February 1, 1979. On the first day of the hearing, in his opening statement, counsel for petitioners reasserted the claim that the statu-

tory standard for finding permanent neglect, located in Section 622 of the Family Court Act, was unconstitutional. He stated, "I have challenged this...on the grounds that it denies the respondents the due process of law and that the appropriate standard of proof should be...clear and convincing evidence." The Court thereupon took note that the Attorney General had been notified and had elected not to appear.

After the conclusion of the hearing, the Family Court of Ulster County determined that the petition should be granted and concluded that "the record in this case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to 'plan for the future of (their children) although physically and financially able to do so.'"

In the court's fact-finding decision, dated March 22, 1979, it devoted two full pages to a discussion of petitioners' claim that the standard of proof required by Section 622 of the Family Court Act was unconstitutional. After noting that the Attorney General had been notified and elected not to appear, the court stated that "a finding of unconstitutionality should not be lightly undertaken by courts of first instance." The court explicitly decided to terminate petitioners' parental rights "upon the standard of proof prescribed by the statute -- 'a fair preponderance of the evidence.'"

Petitioners then appealed directly to the Court of Appeals, claiming that the sole issue involved was a constitutional question. The Court of Appeals declined jurisdiction by ruling that issues other than the constitutional question were involved. The court transferred the matter to the Appellate Division, Third Department.

In their brief to the Appellate Division petitioners argued only one point: that Section 622 of the Family Court Act is unconstitutional in that it denied to petitioners a fundamental right without due process of law. Petitioners again argued that the United States and New York constitutional guarantees of due process of law require that the termination of parental rights be supported by no less than clear and convincing evidence. In a Memorandum Decision, the Third Department followed a previous case decided by that court which held that Section 622 was constitutional. In adhering to the earlier decision, the court noted that "the permanent neglect statute...recognizes and seeks to balance rights possessed by the child...with those of the natural parents... Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional." In the Matter of John "AA", ___ A.D. ___, ___, 427 N.Y.S.2d 319, 320 (3rd Dept. 1980)(citations omitted).

Petitioners appealed to the Court of Appeals of New York, which dismissed the appeal on September 16, 1980.

REASONS FOR GRANTING THE WRIT

I

The precise issue presented in this petition is presently before this Court. Doe v. Delaware, Docket No. 79-5932. If the Court decides in Doe that termination of parental rights must be based on more than a preponderance of the evidence, that decision may not be applied retroactively. Thus, refusal to grant this petition may result in the irrevocable termination of petitioners' parental rights even though the

termination was based on a constitutionally deficient standard. Because the rights at stake are so fundamental, petitioners urge the Court to grant the petition and schedule the case for plenary argument or, minimally, hold the petition until a final decision is rendered in Doe v. Delaware.

II

The substantial importance of the constitutional question involved in this case is most apparent from the fact that the same question is presently before the Court.

Furthermore, it has been the consistent opinion of this Court that the interest of parents in the custody and control of their children is one of the highest rights recognized in American jurisprudence. See Parham v. J.L., 442 U.S. 584 (1979); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Petitioners contend that New York State has deprived them of their fundamental right to the custody of their children without due process of law. It is now beyond peradventure that "freedom of personal choice in matters of... family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639 (1974), cited again in Quilloin v. Walcott, 434 U.S. 246, 255 (1978). See also, Stanley v. Illinois, 405 U.S. 645 (1972); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 301 U.S. 479 (1965).

Standard of proof is an integral function of due pro-

cess. Addington v. Texas, 441 U.S. 418 (1979). Deprivation of sacred family rights based on a standard of proof as low as "preponderance of the evidence" is a flagrant violation of the Fourteenth Amendment. Petitioners' claim must be preserved in order to provide them a hearing that comports with due process.

III

The Third Department's decision upholding the New York statute is in conflict with at least two federal courts and at least twenty-two state appellate courts. Those courts have ruled that the standard of proof for the termination of parental rights and/or adjudication of neglect or abuse must be raised from a "preponderance of the evidence" to a higher standard. The decisions so holding are as follows:

State Courts:

Alabama - Dale County Dept. of Pensions v. Robles, 368 So.2d 39 (Ala. Civ. App. 1979).

Alaska - In re K.S., 2 Fam. L. Rptr. 2198 (1976).

Arisona - Caruso v. Superior Court, 100 Ariz. 174, 412 P.2d 463 (1966).

California - In re Cynthia K., 75 Cal. App.3d 81, 141 Cal. Rptr. 875 (1977); In re Christopher B., 82 Cal. App.3d 609, 147 Cal. Rptr. 390 (1978); In re Angelina M.P., 6 Fam. L. Rptr. 2490 (Calif. Ct. App., 3rd Dist. 1980).

District of Columbia - Matter of Adoption of J.S.R., 374 A.2d 860 (D.C. App. 1977).

Florida - In Interest of C.K.G., 365 So.2d 424 (Fla. App. 1978).

Illinois - Interest of Jones, 34 Ill. App.3d 603, 340 N.E.2d 296 (1975); In re Ybarra, 29 Ill. App.3d 725, 331

N.E.2d 224 (1975); In re Tolbert, 62 Ill. App.3d 927, 38 N.E. 2d 565 (1978).

Iowa - In re Hochmuth, 251 N.W.2d 484 (1977); Long v. Long, 255 N.W.2d 140 (1977); In re Kelly, 262 N.W.2d 781 (1978).

Kansas - In re Eric Hambleton, 574 P.2d 982 (1978); In Interest of Kerns, 225 Kan. 746, 594 P.2d 187 (1979).

Louisiana - State in Interest of Gray, 353 So.2d 393 (1977); In Interest of Jackson, 312 So.2d 912 (La. App. 1975).

Minnesota - In re Welfare of Rosenbloom, 266 N.W.2d 888 (1978).

Nebraska - In Interest of Souza, 204 Neb. 503, 283 N.W. 2d 48 (1979.

New Hampshire - State v. Robert H., 393 A.2d 1387 (1978).

New Jersey - Matter of Guardianship of R., 155 N. J. Super. 186, 392 A.2d 634 (1977); In re B.C.H., 108 N.J. Super. 531, 262 A.2d 4 (1970).

New Mexico - Huey v. Lente, 85 N.M. 597, 514 P.2d 1093 (1973).

Pennsylvania - In re William L., 383 A.2d 1228 (1978).

Texas - In re G.M., 596 S.W.2d 846 (Tex. 1980).

Utah - In Interest of Pitts, 535 P.2d 1244 (Utah 1978).

Virgin Islands - In re Maria, Elisa and Norma C., 5 Fam. Law Rptr. 2039 (Terr. Ct. 1978).

Washington - In re Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973).

West Virginia - In re Willis, 207 S.E.2d 129 (W. Va. 1978).

Wyoming - In re X, Y, and Z, 607 P.2d 911 (Wyo. 1980).

Federal Courts:

Eighth Circuit Court of Appeals - Alsager v. District Court of Polk County, Iowa, 545 F.2d 1137 (1976), affirming

406 F. Supp. 10 (S.D. Iowa 1975).

Southern District of Texas - Sims v. Moore, 438 F. Supp. 1179 (1977)(reversed on jurisdictional grounds, 442 U.S. 415, 1979).

In addition, the lower court's decision upholding the "preponderance of the evidence" standard is possibly in conflict with two decisions of this Court.

In re Winship, 397 U.S. 358 (1970) established that when a child faces loss of liberty for a law violation, due process requires that the facts against him be proved beyond a reasonable doubt. Regardless of whether the proceedings are labeled civil or criminal, and even though delinquency proceedings are concerned with a "child's best interest," the nature of the right at stake, to wit, liberty, calls for the highest standard of proof. 397 U.S. at 367. Justice Harlan, concurring, explained that "the choice of the standard for a particular adjudication does...reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations." 397 U.S. at 370. In termination of parental rights proceedings, an erroneous factual determination costs families their fundamental right to family integrity. Surely such a right deserves more protection than what the "preponderance of the evidence" standard provides.

Addington v. Texas, 441 U.S. 418 (1979) raised the standard of proof required in civil commitment procedures from a "preponderance" of the evidence to "clear and convincing" evidence. That case discussed the intermediate standard of proof - i.e., "clear and convincing" evidence - as applicable to cases in which the interest at stake is more substantial than mere loss of money. When important rights are

at stake, the risk of losing them must be reduced by raising the standard of proof.

The Appellate Division's decision approving the "preponderance of the evidence" standard does not comport with the principles regarding allocation of risks as announced in Winship, supra, and Addington, supra. In order to protect the fundamental right to family integrity, a deprivation of that right must be based on no less than clear and convincing evidence.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,*

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* Counsel wish to acknowledge the invaluable work of Lynn Armentrout, a third-year law student at New York University School of Law, in the preparation of this petition.

APPENDICES

Supreme Court—Appellate Division
Third Judicial Department

MAY 5 1980

May 1, 1980 36228

In the Matter of JOHN "AA"* et al., Children Alleged to be Permanently Neglected.

BERNHARDT S. KRAMER, as Commissioner, Ulster County Department of Social Services,
Respondent,

v.

JOHN "AA"* et al., Appellants.

Appeal from a judgment of the Family Court of Ulster County (Elwyn, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act.

The sole contention upon this appeal is that section 622 of the Family Court Act is unconstitutional because the standard of proof required by the statute, a fair preponderance of the evidence, is so low that it deprives them of due process of law. In Matter of Anthony L. "CC" (48 A D 2d 415, 419), this court held that the level of proof required by section 622 was constitutional. In adhering to our decision, we note that the permanent neglect statute (Social Services Law, § 384-b; Family Ct. Act, § 611, et seq.) recognizes and seeks to balance rights possessed by the child (see Social Services Law, § 384-b, subd. 1; Matter of Bennett v. Jeffreys, 40 N Y 2d 543, 546, 547) with those of the natural parents (see Social Services Law, § 384-b, subd. 1; Matter of Sanjivini K., 47 N Y 2d 374, 382; Matter of Corey L v. Martin L, 45 N Y 2d 383, 392). Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.

Judgment affirmed, without costs.

MAHONEY, P. J., GREENBLOTT, KANE, MAIN and MIKOLL, JJ., concur.

* Fictitious name.

STATE OF NEW YORK

FAMILY COURT : ULSTER COUNTY

In the Matter of the Commitment of Guardianship and Custody pursuant to § 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY, children under the age of Eighteen years alleged to be Permanently Neglected Children.

April 5, 1979

RICHARD W. GRIGGS, Attorney for Commissioner of Social Services.

ALAN SUSSMAN (VICTORIA BLYTHE of Counsel), Attorney for Respondent.

MARRIN & SMYTH (ROSEMARY SMYTH, of Counsel), Attorneys for Foster Parents.

JAY SAMOFF, Law Guardian.

HUGH R. ELWYN, J: The Court has previously found that the allegations required by paragraphs (a), (b), (c) and (d) of section six hundred fourteen of the Family Court Act were supported by a fair preponderance of the evidence (F.C.A. 622).

After a dispositional hearing held on April 5, 1979 the Court now finds that the best interests of all three of the Santosky children require that their parents' custody be terminated permanently (F.C.A. § 623) and that their guardianship and custody be committed to the petitioner, the Commissioner of Social Services of Ulster County (F.C.A. § 631, subd (c). The petitioner's witnesses, Daniel Lucy and Lynn Davis, the social workers in charge of the Santosky case, and the petitioner's two expert witnesses, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center and Elizabeth Smith, Director of the Family Service Center of the Children's Home of Kingston were unanimous and firm in their opinion that the children's best interests required that the parents' right to their custody be permanently terminated and that a permanent and stable home environment be sought for each child through the medium of adoption. No evidence to the contrary has been presented on behalf of the respondents.

The court notes, however, that Dr. Lenore Sportsman expressed the opinion that the children John and Tina could be expected to continue to have psychological difficulties in adjusting to any home situation and that she therefore strongly recommended and, in fact, considered it essential that any set of adoptive parents

should be receptive, amenable and cooperative with efforts to provide them with such professional counseling, whether in the form of psychiatric, psychological, or family counseling services as might be offered to them.

Accordingly, the Court directs the entry of order pursuant to section 687 of the Family Court Act committing the guardianship and custody of Tina Frances Apel, John Santosky III and Jed Conrad Santosky to the Commissioner of Social Services of Ulster County, but will attach to the order of commitment the condition that Commissioner provide supportive help to each child and their respective foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisers may be required to best promote the adjustment of child and foster parents, or adoptive parents, to a healthy and permanent relationship.

The Clerk will prepare and submit an appropriate order.

Dated: April 10, 1979.

STATE OF NEW YORK

FAMILY COURT : ULSTER COUNTY

In the Matter of the Commitment of Guardianship and Custody pursuant to § 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY, children under the age of Eighteen Years alleged to be Permanently Neglected Children.

Docket Nos. B-3-4-5-78.

January 26, 31, February 1, 1979

RICHARD W. GRIGGS, Attorney for Commissioner of Social Services.

ALAN SUSSMAN, Attorney for Respondents.

MARRIN & SMYTH, (WILFRID E. MARRIN, of Counsel), Attorneys for Foster Parents.

JAY SAMOFF, Law Guardian.

HUGH R. ELWYN, J: This case represents a second attempt [1] by the Commissioner of Social Services of Ulster County to terminate permanently the parental rights of John and Annie Santosky by reason of the permanent neglect of their three children.

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1. For the result of the first attempt see Matter of Santosky, 89 Misc. 2d 730, affd., 63 AD2d 750.

(Family Court Act, Art. 6). Each of these three children have been previously adjudicated to be neglected children within the meaning of Article 10 of the Family Court Act and placed with the Commissioner of Social Services for an initial period of 18 months, subject to the further order of the court. Tina Frances Apel, now age 7, has been in foster home placement since November 20, 1973; John Santosky, now age 5, since September 30, 1974 and Jed Conrad Santosky, now age 4, since September 30, 1974. The placement of these three children has twice been extended (Family Court Act § 1055), the latest extension being on June 14, 1977, and a third application for an extension of placement filed June 13, 1978 is currently pending with this proceeding. The Court takes judicial notice of its own records that relate to the proceeding before it (Matter of Denlow, 87 Misc. 2nd 410, 411-412 and cases there cited).

This proceeding instituted pursuant to Section 384-b of the Social Services Law (L. 1976, c 666, effective January 1, 1977) [2] was initiated by the filing of a petition on October 16, 1978 pursuant to subd. 4 (d) of that law and Article 6 of the Family

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2. This statute had been enacted, but was not effective at the time of the earlier trial in this case which occurred in November 1976.

Court Act. The Petition contains all of the necessary allegations required by Section 614 of the Family Court Act.

Although the petition alleges, after detailing the agency's diligent efforts to encourage and strengthen the parental relationship, that "notwithstanding such efforts, the parents have failed for a period of more than one year following the date the children came into the care of the petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d), it was not contended nor was any proof offered at the trial that the parents had failed to maintain contact with their children. On the contrary it is conceded they have through their counsel, diligently sought to have permitted to them such contact through supervised visits as the agency would allow. At one point in these proceedings the Agency, upon advice of their expert consultant in child psychiatry, sought to curtail altogether the parents' contact with their children in foster care upon the ground that such visitation was confusing and even detrimental to the children's emotional well being. The parents' right to maintain contact with their children through periodic visitation was restored only through the

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intervention of the court. [3]

However, the proof in this case shows that on some sixteen occasions when visits with their children were scheduled the father was from twenty minutes to an hour late and on one occasion when fire engines passed the house found them momentarily more demanding of his time and attention. In any event, such visits as did take place between the parents and their children were at best superficial and devoid of any real emotional content, and were probably wholly meaningless from the standpoint of the children who have come to view their real parents as strangers and their meeting with them as something only to be endured. From the caseworker's description of the infrequent visits that have occurred the court finds such visits to have been "of such character as to overtly demonstrate a lack of affection and concerned parenthood" (Social Services Law, § 384-b, subd. 7 (b). Such visits "shall not be deemed a substantial contact". (Social Services Law, § 384-b subd. 7 (b). Moreover, it is noted that the same subdivision of section 384-b of the Social Services Law declares that: "(F)or the purposes of paragraph (a) of this

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3. See written, but unpublished, decision of this court, dated June 27, 1977, pp. 10-14. Appendix A.

subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child." Consequently, the court could, even though the point is not seriously urged by the Commissioner, find the children to be permanently neglected, on that ground alone (Matter of Orlando, 40 N.Y. 2d 103).

The Commissioner has elected, however, as in the first case, to predicate his contention that the children have been permanently neglected solely upon the parents' "failure to plan for the future of their children" (F.C.A. §§ 611, 614, subd. 1, (d)) "The statute * * * is stated in the disjunctive and, thus, even though parents may maintain contact with their children, the failure to plan for the future of the children, in and of itself, suffices to support a determination of permanent neglect (Matter of Orlando F., 40 N.Y. 2d 103; Matter of Amos HH, 59 AD2d 795)" (Matter of Leon "RR", 64 AD2d 118 , 3rd Dept., January 25, 1979). The Commissioner has, quite wisely I believe, eschewed any temptation to predicate this case upon the theory that there has evolved from Bennett v. Jeffreys, 40 N.Y. 2d 543 a non-statutory, no-fault basis for the permanent termination of parental rights.

Even though this case is predicated upon and is decided on statutory grounds (Social Services Law 384-b and F.C.A. Art. 6), the non-statutory - no-fault concept as a basis for the permanent termination of parental rights has had such an appealing fascination for some courts that it deserves some discussion here, lest this insidious and pernicious doctrine of questionable constitutional validity find further lodgment in the law.

The Non-Statutory, No-Fault Concept.

Although Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543 did not "involve an attempted permanent termination of custody (Family Court § 614, subd 1; § 631; Matter of Anonymous (St. Christopher's Home), 40 N.Y. 2d 96; Matter of Orlando F., 40 N.Y. 2d 103; Matter of Ray A.M., 37 N.Y. 2d 619)" some courts have found in the "extraordinary circumstances" rule of Bennett, particularly where there has been a "protracted separation" of parent and child and "the psychological trauma of removal is grave enough to threaten destruction of the child," a new non-statutory, no-fault ground for termination of parental rights. Since the Court of Appeals in Bennett did not expressly create such a new ground for termination of parental rights and was indeed careful to state with care and specificity the circumstances under which inter-

vention by the State in the right and responsibility of a natural parent to custody of a child would be warranted (p. 549), the source of this novel predicate for the exercise of the power of the State can only be traced to the command of the same court in Matter of Sanjivini K., 40 N.Y. 2d 1025, 1026, to resolve "the status of the child and the rights and obligations of the parties in that permanent neglect proceeding in conformity with the standards we have enunciated (Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543)."

Instead of limiting the command of the court to the dispositional phase of a proceeding for the permanent termination of parental rights (Family Court Act, Art. 6) where by statute "the best interests of the child" is the focus and thrust of the proceeding (Family Court Act §§ 623, 614, subd. 1 (6)), the courts have found in Bennett a new non-statutory, no-fault ground for terminating parental rights (See Matter of Sanjivini K., 63 AD 2d 1021). This newly invented concept of "de facto permanent neglect" did not, however, go completely unchallenged, but was in fact severely criticized by the two dissenting justices as a concept for which there was no statutory authority or decisional precedent - one not sanctioned by anything in Bennett v. Jeffreys

(See dissent pp. 1021-1031).[4]

A number of other appellate courts have by their holdings likewise seemingly sanctioned the creation of this new and independent non-statutory, no-fault ground for the termination of parental rights (See, Matter of Abbott House v. Barbara J., 55 AD2d 604; Matter of Leticia Rose M., 54 AD2d 909; Matter of Kim Marie J., 59 AD2d 716; Matter of Jean Yvette E., 59 AD2d 907; Matter of Jonathan D., Jewish Child Care Assn. v. Donald F.D., 62 AD2d 947).[5]

It remained, however, for the judges of the Family Court to come forth with a clear and unequivocal articulation of the new concept of a non-statutory, no-fault ground for the termination of parental rights. The first to do so was Judge DONOVAN of Westchester County in Matter of Amy S., 89 Misc. 2d 42, 49-50, followed by Judge GARTENSTEIN of New York County in Matter of

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4. Matter of Sanjivini K., 63 AD2d 1021 is on appeal to the Court of Appeals. The case should provide final clarification of the "best interests" test of Bennett v. Jeffreys to statutory termination proceedings.

5. The Appellate Division affirmed an order dismissing a permanent neglect petition, but modified it by directing the court to hold a dispositional hearing on the issue of the best interest of the child. Pursuant to that direction the Family Court held a hearing and continued foster care. However, the Family Court, recognizing the unsatisfactory state of the case law in this area urged the court of Appeals to rule on the applicability of Bennett, 40 N.Y. 2d 543 to cases involving Agencies and the termination of parental rights (Matter of Jonathan D., Fam. Ct., New York Co., N.Y.L.J. Feb. 9, 1979, p. 6, c. 3).

Suzanne Y., 92 Misc. 2d 652, 658-661,[6] Judge MILLER of Rockland County in Matter of Strausberg, 92 Misc. 2d 620, 624 and Judge FOLLETT of St. Lawrence County in Matter of Andress, 93 Misc. 399, 402-403.

Most recently, the Appellate Division (3rd Dept) in Matter of Leon "RR", 66 AD2d 118 , has found in Matter of Bennett v. Jeffreys, 40 N.Y. 543 and Matter of Sanjivini K., 40 N.Y. 2d 1025 "a common law standard for termination of parental rights independent of the statutes", citing Matter of Kim Marie J., 59 AD2d 716, and Matter of Suzanne Y., 92 Misc. 2d 652.

All of this, as Judge DONOVAN in Matter of Amy S., supra points out (p. 50), is to embark upon a "path fraught with danger", for the concept opens the lid of a "Pandora's Box" (p. 45). Likewise, Judge GARTENSTEIN in Matter of Suzanne Y., supra 662 was equally uncomfortable with the unpredictability and the potential for abuse and tyranny such a concept provides for social agencies and courts to exercise for the good of its victims.

Moreover, the concept of a non-statutory, no-fault ground for the termination of parental rights, because a court determines that "the best interests" of the child requires it, is fraught

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6. Matter of Suzanne Y., 92 Misc. 2d 652 has been reversed by the Appellate Division, First Department, 66 AD2d 723 . The Court unanimously rejected Judge Gartenstein's "no fault" theory of termination of parental rights.

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with a serious constitutional question.

"In a long line of cases dating back more than 50 years, the Supreme Court has endowed the family with an aura of constitutional protection. In Meyer v. Nebraska, 262 US 390 (1923), the court invalidated a state law which prohibited the teaching of German. It held that the State's 'concern' for children and their best interest - in this case, the protection of children from foreign influences - was insufficient to overcome parents' rights to control their children's upbringing. In the more recent past in Stanley v. Illinois, 405 U.S. 645 (1972), the court invalidated an Illinois statute which automatically deprived non-marital fathers of their children's custody upon the death of their mother. In describing the rights of parents as compared to non-related third parties, the court stated:

> "(We have) frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man' and 'rights far more precious than property rights'. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

The integrity of the family has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

"And most recently, in Smith v. Organization of Foster Families, 53 L. Ed. 2d 14 (1977), a case involving the three sided dispute between the state, natural parents and foster parents (see Children's Rights Report, Vol. 1, Nos. 4 & 6), a unanimous Supreme Court held that the right of natural parents to the custody of their children is a 'constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right.'

"Relying on these and other cases, the Supreme Court has underscored a right which is nowhere clearly mentioned in the constitution but has recently come to be known as the 'right of family integrity'." (Quoted from Children's Rights Report, Vol. III, No. 2, October 2, 1978, p. 2).

In Smith v. Organization of Foster Parents, 431 U.S. 816, 53 L. Ed. 2d 14; 97 S. Ct. 2097 Justice POTTER STEWART in his separate opinion emphasized that the constitution forbids the state from depriving fit parents of their children because it

believes it to be in the child's "best interests", or because the child will be happier with someone else. In his opinion in which the Chief Justice and Mr. Justice REHNQUIST concurred he wrote: "One of the liberties protected by the Due Process Clause, the court has held, is the freedom to 'establish a home and bring up children' Meyer v. Nebraska, supra, at 399, 67 L. Ed. 1042, 43 S. Ct. 625, 29 ALR 1146. If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that dodo so was thought to be in the child's best interest, I should have little doubt that the State would have intruded impermissibly on the 'private realm of family life which the state cannot enter' Prince vs. Massachusetts, 321 US 158, 166, 88 L. Ed. 645, 64 S. Ct. 438" (Smith v. Organization of Foster Parents, supra, 53 L. Ed. 14, 46-7).

More recently, the United States Supreme Court clearly raised the warning flag when in Quilloin v. Walcott, U.S. 54 L. Ed. 2d 511-519-520, 98 S. Ct. 549, 554-555 it said: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. (citations.) 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

freedom include preparation for obligations the state can neither supply nor hinder'. (citation.) And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment'. (citation.)

"We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'." (citing Smith v. Organization of Foster Families for Equality and Reform, 431 US 816, , 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart J., concurring).

Likewise, the court of appeals in Bennett v. Jeffreys, 40 N.Y. 543, 548, which is the fountain-head for the development of the no-fault basis for the termination of parental rights and again in Matter of Goldman, 41 N.Y. 2d 894 recognized that in the exercise of the state's power there are constitutional limits to be observed. (See also, Janet G. v. N.Y. Foundling Hosp. 94 Misc. 2d 133, 141-142). More recently, in Matter of Corey L. v. Martin L., 45 N.Y. 2d 383 the Court of Appeals speaking with respect to

the termination of parental rights through adoption said (p. 386): "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on one who would terminate the rights of a natural parent through adoption". The constitutional barrier to the termination of a parent's rights is again emphasized by the court when at p. 389 it says: "Nevertheless,' while accepting the change wrought by statutory law, this court has and must continue to respect constitutional limitations on the procedures for termination or deprivation of parental rights (see Matter of Goldman, 41 N.Y. 2d 894, 895, supra; Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543, 548)". And again at p. 392 the court says: " * * *, the statute should not be so broadly applied that it establishes a preference. A termination of parental rights is a drastic event indeed so much so that it raises questions of constitutional dimension" (citing Matter of Goldman and Bennett v. Jeffreys, supra).

Although Matter of Corey L. v. Martin L., supra dealt with the termination of a parent's right by reason of abandonment in the context of an adoption proceeding there is language in the court's opinion which can fairly be said to create some doubt as to whether or not the Appellate Divisions and the Family Courts have not gone too far in finding in Bennett a non-statutory, no fault ground for termination of parental rights all in obeisance to the rubric of

the "best interests" of the child. For instance, at p. 389 the court says: " . . . the ultimate question is whether the submitted proof establishes abandonment as a matter of law", citing Matter of Bistany, 239 N.Y. 19, 24 and Matter of Maxwell, 4 N.Y. 2d 429, 433. Cannot one with equal logic substitute "permanent neglect" for "abandonment"? And again at p. 391 the court says: "Absent consent, the first focus there was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. * * * * The best interests of the child, as such, is not an ingredient of that conduct (the parents) and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment". Again the question arises, cannot the words "permanent neglect" be substituted for "abandonment"? And finally, the court says (pp. 391-392): "If, for purposes of determining mere custody, the best interests of the child would not permit a parent to be displaced in the absence of extraordinary circumstances, surely a complete termination of obligations and rights is not to be

allowed in a situation where, as here, abandonment has not been established, even if an ensuing adoption might be viewed by some to be in the best interests of the child."

The Court of Appeals decision in Corey L. v. Martin L., supra has caused some Family Court Judges to have some second thoughts as to whether the implications thought to have flowed from Bennett have not been too broadly applied (See decision of Judge GARTENSTEIN who "crystalized" the no-fault concept in Matter of Suzanne Y., 92 Misc. 2d 652 in the Second Matter of Suzanne Y., 95 Misc. 2d 733; Matter of Elizabeth Green, Family Ct., Bronx Co., N.Y.L.J. Dec. 12, 1978, p. 12, c. 6; and In re Jonathan D., Family Ct. New York County, N.Y.L.J. Feb. 9, 1979, p. 6, col. 3). Obviously, the last word on the concept of a non-statutory, no fault ground for the permanent termination of parental rights has not yet been written and won't be until the Court of Appeals has occasion to clarify and resolve the issue.[7]

It is not necessary for this court to attempt to resolve the constitutional issue posed by the concept of no-fault termination of parental rights based upon a comparative best interest standard, for the case can be decided on statutory grounds (Social Services

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7. The Court of Appeals may soon have the opportunity to do so, since the decision of the Appellate Division (2nd Dept) in Matter of Sanjivini K., 63 AD2d 1021 is now on appeal to the Court of Appeals.

Reversed 47N.Y. 2d 394.

Law § 384-b and Family Court Act, Art. 6). "Constitutional questions should not be reached unless their disposition is necessary" (Comiskey v. Arlen, 55 A D 2d 304, 306, affd. 43 N.Y. 2d 696). It is enough to point out the constitutional infirmity in such a concept, leaving its final resolution to an appellate court.

Constitutionality of Quantum of Proof.

The respondent has raised a question as to the constitutionality of section 622 of the Family Court Act which permits the court to determine whether the allegations of permanent neglect (paragraphs (a), (b), (c) and (d) of subdivision one of section 614) are supported by a fair preponderance of the evidence. It is contended that to be constitutional the standard of proof must be "beyond a reasonable doubt" or at least "clear and convincing". The Attorney General has been notified that the constitutionality of the statute will be brought into question (Executive Law § 71, CPLR § 1012 (b), in this court, but he has chosen not to appear.

In response to the constitutional issue the court notes that sections 611 and 614 have been found to prescribe a constitutional standard of proof by the Appellate Division (3rd Dept.) In re Anthony L. "CC", 48 AD2d 415 and by a Family Court in Matter of Orzo, 84 Misc. 2d 482, 490-493.

Moreover, a finding of unconstitutionality should not be lightly undertaken by courts of first instance. "A statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such decision is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the Act is apparent on its face". (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150, and authorities there cited. See, e.g. Comiskey v. Arlen, 55 A D 2d 304, affd. 43 N.Y. 2d 696; Bolling v. Corsi, 204 Misc. 778, 783, affd. 306 N.Y. 315). The tendency is to leave such questions to appellate tribunals (City of New Rochelle v. Echo Bay WaterFront Corp., 182 Misc. 176, 177, affd. 268 A D 2d 182, affd. 294 N.Y. 678). Even intermediate Appellate Courts sometimes defer to higher appellate courts (Matter of Excelsior Pictures Corp. v. Regents, 2 A D 2d 941). "There is a strong presumption that a statute duly enacted by the Legislature is constitutional" (People v. Pagnotta, 25 N.Y. 2d 333, 337).

Consequently, the issue of the constitutionality of the statute (F.C.A. § 622) will not be passed upon and the decision

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here made is predicated upon the standard of proof prescribed by the statute - "a fair preponderance of the evidence".

The Agency's Diligent Efforts.

The only real plan for the future of the Santosky children that has ever been formulated by anyone is the plan evolved by the Commissioner of Social Services pursuant to this Court's order of December 31, 1975 (See Matter of Santosky, supra 732).

To implement this plan through "diligent efforts" [8] to encourage and strengthen the parental relationship, the Agency in accordance with court's directive, redoubled its efforts to raise these parents to an acceptable minimal level of competency as parents (See Matter of Santosky, supra 741).

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8. Section 384-b, subd 7 (f) defines this phase as follows:

"(f) As used in this subdivision, 'diligent efforts' shall mean reasonable attempts by an authorized agency to encourage a meaningful relationship between the parent and the child, including but not limited to:

(1) Consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family.

(2) Making suitable arrangements for the parents to visit the child.

(3) Provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated.

(4) Informing the parents at appropriate intervals of the child's progress, development and health."

For an elaboration of the need for the Agency to make "diligent efforts" and the consequences of its failure to do so, see Matter of Anita FF, [illegible] 18.

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The Commissioner in his petition alleges and the proof supplied through the testimony of the two case workers in charge of the Santosky case supports a finding that following this court's decision in January 1977 and for the past two years at varying times the Agency has offered and arranged for and encouraged the respondents to accept:

(a) Visits with the children on an average of twice a month, the children being brought to their home.

(b) Attendance by Respondent, Annie Santosky at the Child Enrichment Program offered by the Family Service Center to mothers with pre-school children, which program included the use of a parent aid. Transportation was provided.

(c) Psychological evaluations of both respondents, and a complete neurological evaluation of the Respondent, John Santosky, at St. Francis Clinic, Poughkeepsie. Transportation was also provided.

(d) Follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.

(e) Counseling sessions for Respondents with certified social worker, Elizabeth Smith of Family Service Center.

(f) Birth control counseling at Planned Parenthood.

(g) Vocational training to the Respondent, John Santosky through the Office of Vocational Rehabilitation and Gateway Industries.

(h) Education assistance to the Respondent, John Santosky at the Adult Learning Center.

(i) Nutrition Aid Services to Respondent, Annie Santosky since November 1977.

(j) Homemaker Service to help the Respondents immediately prior to and after the birth of their fourth child in June 1978.

(k) Public Assistance, Food Stamps and Medicaid to the Respondent. The total value of all Social Services offered to the Respondents since November 1976 exceeds $16,000.

"In short," as the court stated in its opinion in Matter of Santosky, supra, 733; "ever since the Santosky children have been in foster home placement, the parents have not only had offered, but diligently urged upon them every social service available in Ulster County which could conceivably have helped the Santoskys in achieving a goal of the eventual reunion of the family".

I am satisfied, therefore, as I was in the earlier case, that the preponderance of the evidence supports a finding that the Ulster County Department of Social Services has indeed made diligent efforts to encourage and strengthen the parental relationship. The observation that it has done so, "albeit with minimal success" cannot, however, be truly said of the Agency's renewed

and redoubled efforts. To credit the Agency's efforts with any success this time around is to take a more charitable view of the matter than the evidence warrants, for both case workers who have been so long intimately involved with providing social services to this family testified that in spite of all their efforts they could discern no forward progress whatever; that their progress in parenting ability and skills was non-existent. At the end, the Santoskys' capacity to function as parents for their children remained as minimal as at the start. Regretfully, the Agency acknowledges that its diligent efforts through the offering of a variety of social services, which met with a response ranging from grudging acceptance to outright hostility has been a failure. Nevertheless, in spite of ample cause for discouragement and ultimate failure the court is satisfied that the requirement of paragraph (c) of subdivision one of Section 614 of the Family Court Act has been amply met by a preponderance of the evidence.

Since the children who are but 7, 5 and 4 years of age are all obviously under 18 years of age and are presently by virtue of orders of this court in the care of the Ulster County Department of Social Services, an authorized Agency, the court finds that the requirements of paragraphs (a) and (b) of subdivision one of Sec-

tion 614 of the Family Court Act are supported by a preponderance of the evidence. As in the first trial of this case the critical issue and the one on which the parents right to the continued possession of their children stands or falls, is their alleged failure to plan for the future.

The Parents' Financial Ability to Plan.

To sustain an adjudication of permanent termination of parental rights there must be a finding that the parents "failed for a period of more than one year * * * substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so", (F.C.A. §§ 611, 614, subd. 1 (d)).

Because the phrase, although . . . "financially able to do so" could not under well recognized rules for the construction of statutes be rejected as superfluous but had to be given meaning and effect (McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 231), the court in its earlier decision in this case found that because they were the recipients of full public assistance, including food stamps and medicare, that the Santoskys' financial ability was non-existent. In short, the court found that by reason of their poverty, their failure to plan for the future had to be excused (See Matter of Santosky, 89 Misc. 2d 730). Although the dismissal of the proceeding was affirmed on appeal, this conclusion

of the trial court was rejected by the Appellate Division (3rd Dept) which in its decision of affirmance under the name of Matter of John W. and others, 63 AD2d 750 said: "The Court determined, however, that respondents' failure to plan for the future of the children had to be excused by their poverty. It is the opinion of this court that, absent evidence that a parent is receiving an inadequate amount of public assistance, the fact that the parent is receiving public assistance does not automatically excuse that parent from substantially planning for the future of a child. There was no proof in the present case that respondents were receiving inadequate public assistance."

This view of the adequacy of public assistance to provide sufficient financial ability to plan for the future seems to be shared by the Appellate Divisions of both the 1st and 4th Departments. In Matter of Klug, 32 AD2d 915 the 1st Dept. observed: "So far as financial ability to care for a child is concerned, the court is well aware of the fact that in this city a mother may obtain support to maintain herself and her child." And in Matter of Karas v. Karas, 59 AD2d 1022 the 4th Dept. said: "Respondent contends on appeal that the proof fails to establish by a preponderance of the evidence that she was financially and physically able either to maintain contact with or plan for the

future of her children. The assertion of financial ability clearly lacks merit. Although respondent was a recipient of public assistance, she could have made arrangements to visit and communicate with her children."

To rebut any contention that the public assistance furnished to the Santoskys might be inadequate, although no such contention was in fact made, the Commissioner offered proof that from December 1, 1976 to September 30, 1978 the County of Ulster furnished to the Santoskys financial assistance totaling $15,338.72 in the following categories and amounts:

Public Assistance	$ 9,120.00
Medicaid	2,633.72
Nutrition Aide	150.00
Counseling Service	300.00
Child Welfare Caseworker Counseling	3,155.00
TOTAL	$ 15,338.72

In light of the Appellate Division's decision in this case, Matter of John W. and others, 63 AD2d 750, and the Appellate decisions to which reference has been made the court is constrained to hold that the Santoskys' total dependence on public assistance throughout the history of this litigation furnishes no excuse for their failure to plan for the future of their children so long in foster care.

Failure to Plan.

This court in its earlier decision in this case (Matter of Santosky, 89 Misc. 2d 730, affd. 63 AD2d 750) reviewed at some length (pp 734-5) the decisional definitions of the phrase "substantially to plan for the future of the child." Much of what was there said has now been codified by the enactment of Section 384-b of the Social Services Law (L. 1976, c. 666, effective January 1, 1977) where in subd. 7 (c) "to plan for the future of the child" is defined.

Social Services Law § 384-b, subd. 7 (c) now provides:

"(c) As used in paragraph (2) of this subdivision, 'to plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent".

In contrast to the situation prevailing at the time of the first trial (November 1976) when this court was able to find that "while the Santoskys' plans for the future of their children (were) indeed nebulous and (had) never been articulated, they (had nevertheless) 'acted to accomplish' the agency's plans" [9] these parents' failure since 1976 to "utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources" has been almost total and complete. Except for superficial cooperation with a nutritional aide and a public health nurse, the Santoskys have failed in any meaningful way to take advantage of the many social and rehabilitative services that have not only been made available to them but have been diligently urged upon them. Even Elizabeth Smith, Director of the Family Service Center of the Children's Home of Kingston, the witness who was previously most favorable to their cause, has been reluctantly forced to conclude because of their passivity and reluctance to participate in activities designed to

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9. This finding was found by the Appellate Division to be sufficiently supported by the record. "Considering the record as a whole, we are of the opinion that the respondents have substantially planned for the future of their children" (Matter of John W. and others, 63 AD2d 750).

help them, [10] particularly the Children's Enrichment Program, a program specifically designed to deal with the problems of parent-child relationships, that the return of any of the children to the Santoskys' in any foreseeable future should not be considered.

At no time can it be fairly said that these parents have ever "tak(en) such steps as may be necessary to provide an adequate, stable home and parental care for the child(ren) within a period of time which is reasonable under the financial circumstances available to (them)," (Social Services Law § 384-b subd. 7 (c)). Two of these children have been in foster care for more than four years and the third more than five. For all of this time the Santoskys have been the recipients of Social Ser-

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10. The four factors which to the witness provided contradiction to the return of the children to the Santosky home within the foreseeable future were:

> "1. The Santoskys' passivity in seeking and participating in activities intended to be helpful to them (In the main, I see them only if I am able to go to their home as they have made numerous excuses as to why they could not keep appointments at my office);
>
> 2. The Santoskys' restrictive parenting practices which inhibit normal development in their child;
>
> 3. The Santoskys' fears which preclude participation in activities outside their own family group.
>
> 4. The recent birth of a fifth child which adds to the demands made upon both Mr. and Mrs. Santosky."

vices [11] and there is nothing in their situation which holds out any hope that they may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time it must be said, "enough is enough".

Except for the plan [12] formulated by the Agency, and the Santoskys' superficial efforts to comply therewith, which have tapered off to the point where they are no longer measureable, there has never been any "plan" formulated by the parents, probably because they are simply incapable of doing so. However, even giving them credit for their miniscule efforts to comply with the Agency's plan through taking advantage of the social services offered to them is no longer enough to save them from the loss of their children, for the statute states that, "good faith effort shall not of itself, be determinative". (Social Services Law § 384-b, subd. 7 (c)).

In short, the time has arrived when the court must acknowledge,

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11. Since 1976 a total of $9,120 has been provided in public assistance and a total of $6,118.72 in other social and rehabilitative services.

12. See Matter of Santosky, 89 Misc. 2d 730.

no matter how tragic the result may be for these parents, that the Santoskys are not now capable, and at any time in the foreseeable future, are probably incapable, despite all efforts to assist them, of planning for the future of their children as that term is defined by law (Social Services Law, §384-b, subd. 7 (c)), in any meaningful way. I therefore conclude that the record in this case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to "plan for the future of (their children) although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d); Matter of Orlando F., 40 N.Y. 2d 103).

The testimony of the petitioner's witness, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center, and Exhibits No. 2-4 in evidence have not been considered in the determination of the Fact Finding phase of this proceeding (F.C.A. § 622, but will be considered in the Dispositional Hearing (F.C.A. § 623).

This matter will, therefore, be scheduled for a dispositional hearing "to determine what order of disposition shall be made in accordance with the best interests of these children" (F.C.A. § 623). The Clerk of the Court is directed to schedule such a dispositional hearing on notice to all interested parties.

In the meantime, and until such a hearing can be held, the

Commissioner's application for an extension of placement is granted and the children are continued in the care of the Commissioner of Social Services (F.C.A. § 1055).

Dated: March 12, 1979.

STATE OF NEW YORK

FAMILY COURT : COUNTY OF ULSTER

In the Matter of

TINA FRANCES APEL	Docket Nos.
JOHN SANTOSKY III	N-34-73
JED CONRAD SANTOSKY	N-35-74
	N-36-74

Persons Alleged to be Neglected Children.

June 14, 1977

RICHARD GRIGGS, Attorney for Department of Social Services.

ALAN SUSSMAN, Attorney for Respondents.

JAY SAMOFF, Law Guardian for Children.

HUGH R. ELWYN, J.: Tina Frances Apel, now nearly 6 years of age, the daughter of Annie Santosky, one of the respondents herein, was adjudicated to be a neglected child within the meaning of Article 10 of the Family Court Act on November 26, 1973 and placed with the Ulster County Commissioner of Social Services for an initial period of 18 months, subject to the further order of this court.

The order of placement was, by consent, temporarily extended on May 10, 1975 and again on August 19 and December 5, 1975. On December 31, 1975, in accordance with this court's written decision of the same date order of placement was extended for a period of one year from the date of the expiration of the initial 18 months of placement until May 26, 1976.

John Santosky III and Jed Conrad Santosky who are now nearly 4 and 3 years of age respectively, the children of John and Annie Santosky were each adjudicated to be neglected children within the meaning of Article 10 of the Family Court Act on September 30, 1974 and placed with the Ulster County Commissioner of Social Services for an initial period of 18 months, subject to the further order of this court. On March 9, 1976 the order of placement for John Santosky III and Jed Conrad Santosky was extended, upon consent, to April 13, 1976. On April 13, 1976 the orders of placement for John Santosky III, Jed Conrad Santosky and Tina Frances Apel were, on consent, extended to July 15, 1976. Without objection all three children continued to remain in foster care after July 15, 1976, although the order for extended placement had expired.

On September 9, 1976 the Commissioner of Social Services filed petitions involving all three children (Docket Nos. B-4-76,

B-5-76 and B-6-76) charging the parents with permanent neglect (F.C.A. Article 6). On September 24, 1976 in proceedings had in the permanent neglect proceedings, at which the Commissioner and the respondents were represented by counsel and the children by their Law Guardian, the orders of placement affecting the three children in Docket Nos. N-34-73, N-35-74 and N-36-74 were, on consent, "extended until such time as the court makes a determination in the permanent neglect proceedings now before it", without prejudice to the rights of the petitioner and the law guardian to make an application for an extension of the order of placement.[1] Accordingly, on September 24, 1976 orders extending the placement with the Commissioner of Social Services were made continuing the status quo as to all three children without prejudice to the rights of the petitioner or the respondents.

The proceedings in which all three children were alleged to be permanently neglected was tried in this court on November 16, 17, and 18, 1976; a decision was rendered dismissing the petitions on January 28, 1977 and an order entered accordingly. This decision is now on appeal to the Appellate Division, 3rd Department. Although this court's decision and order dismissing the permanant

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1. As an appendix a transcript of that portion of the proceedings of September 27, 1976 containing the aforesaid stipulation of counsel is annexed hereto.

neglect proceedings was made on January 28, 1977, the children have continued to remain in the Commissioner's care in foster homes.

On March 31st, 1977 the Commissioner filed separate petitions in each neglect case seeking an extension of placement for each of the Santosky children for the reason that "to return child would be contrary to best interest of this child. The parents are not cooperating fully with the services being recommended to strengthen the parental relationship". Attached to each petition is a copy of a report from Lenore M. Sportsman, M.D., Director of the Albany Child Guidance Center for Psychiatric Service affiliated with Albany Medical College Union University, warning of the adverse impact upon the children of continued exposure to their parents. Since "no placement shall be extended or continued * * * * except upon a hearing held concerning the need for extending or continuing the placement" (F.C.A. § 1055 (ii)), a hearing on the petitioner's request for an extension of the placement was held on June 14, 1977.

Unlike an application for the extension of placement of a juvenile delinquent or a PINS which when it has expired may not be extended nunc pro tunc (People ex rel. Schinitsky v. Cohen, 34 A D 2d 1020), an application for extension of an expired order of placement may be granted where the original order of placement was made in a neglect proceeding pursuant to Article 10 (Matter of

Morris W., 79 Misc. 2d 567). Accordingly, even though the application for the extension of placement was not made until two months after the court had rendered its decision in the permanent neglect matter and the order of placement pursuant to the stipulation of September 27, 1976 had expired, the court will, nevertheless, entertain the Commissioner's application for an extension of the orders of placement for these children. The imperative of this court's responsibility to act in the best interests of these children who, as a de facto matter are still in foster care, demands that the court assume jurisdiction in spite of any possibility of loss of jurisdiction through a lapsed order.

Although still maintaining, as he did on previous applications for the extension of placement and in the permanent neglect proceeding, that the Santoskys have yet to demonstrate their capacity to function as responsible parents capable of providing for their children, the emphasis in the Commissioner's case has now shifted from the shortcomings of the parents to the potential psychological damage to the children were they to be returned to their parents to justify the need for continued placement. For essentially the same reason, i.e. the psychological trauma to the children through exposure to the parents, the Commissioner has cut off the parents visitations with their children and has permitted no visits by

the parents with their children since this court's decision in the permanent neglect case in January 1977.

In fairness, it must be said that the Commissioner's position is not wholly arbitrary but is supported by and based almost entirely upon the very respectable professional opinion of Dr. Lenore Sportsman, the Director of the Albany Child Guidance Center in a series of reports to the Commissioner which reports are in evidence[2] and which were corroborated and elaborated upon by the doctor's sworn testimony.

In summary the Dr. found in each child evidence of emotional "hang-ups" (depression, anxiety) related to a fear of having to be repossessed by their parents; that the natural parents no longer represented the "psychological parents"; that for the children to be compelled to maintain contact with their natural parents would only exacerbate their fears and anxieties; that there was nothing positive for the children in allowing continued contact between the children and their parents, but rather that it would hinder their progress.

In contrast to Dr. Sportsman's opinions stands the testimony of Elizabeth Smith, the Director of the Family Planning Center, a witness for the Santoskys, who over a period of many months has worked closely with both Mr. and Mrs. Santosky counselling them

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2. See Appendix 11.

in many areas, but essentially, as she put it, to become individuals capable of standing on their own feet and to be emotionally independent of the other. Although she felt it important that the parents be permitted to maintain contact with their children for their emotional health, she also conceded under questioning by the court that the time was not yet ripe for the immediate return of all three children to the parents. Instead, she recommended a phased reintroduction of the children into the home and when asked by the court for her professional advise in the matter, counseled against the immediate return of the children.

It is interesting to note that both of the professional witnesses who testified conceded that neither had talked to the other side or considered their point of view. That is, Dr. Sportsman's opinion concerning the psychological impact upon the children from further exposure to the parents was based solely upon her examination of the children without talking to the parents or taking into account their point of view and Mrs. Smith's opinions were based solely upon her contacts with the Santoskys and an espousal of their cause without ever having seen or made any attempt to evaluate the children. Thus, both professional witnesses were really advocates with a bias - Dr. Sportsman for the children and Mrs. Smith for the parents.

The court is well aware of its responsibilities to act in these matters in the best interests of the children, but the court also believes that it has a responsibility to the parents as well and that in evaluating the need for an extension of placement the court must weigh and, if possible, try to accommodate what seems to be competing interests. In discharging that responsibility the court has conscientiously weighed these competing interests and for the reasons hereinafter expressed is of the opinion that the time is not yet ripe for the immediate return of all three children to the Santosky household.

First, because in spite of the long time that has elapsed since these children were first placed in foster care and the conceded substantial progress the Santoskys have made toward becoming more emotionally stable, mature persons and Mr. Santosky's commendable academic progress toward securing a high school equivalency diploma, I am not yet convinced that I can with a clear conscience safely entrust the care and upbringing of these children to these parents, especially when I recall the circumstances which led to the original adjudication of neglect.

Secondly: Mrs. Elizabeth Smith, the Santoskys' own professional witness and the person most sympathetic to their plight and their cause has counseled against it.

Thirdly: An appeal from the court's decision dismissing the Commissioner's case of Permanent Neglect is pending in the Appellate Division, Third Dept. If the Appellate Court were to reverse the court's decision and find that these children were indeed permanently neglected children within the meaning of Article 6 of the Family Court Act and Section 384-b of the Social Services Law, and direct their commitment to the Commissioner for adoptive placement, the Santoskys' joy upon their reunion with the children would have been illusory and short lived at best; at worst, it would wreak untold emotional havoc upon the children to have been taken from their foster parents to be delivered to their natural parents who, according to Dr. Sportsman, no longer are the psychological parents only to have them uprooted once more for re-delivery to the foster parents for adoption. Prudence would seem to dictate that this eventuality, which can only be described as a nightmare for the children, should be avoided at all costs. On the other hand, if the children are continued in foster care and the Appellate Court should affirm this court's decision finding these children not to be permanently neglected children as that term is used in the law, no movement of the children would have taken place in the interim and the parents would still be free to seek an early termination of the court's order extending their placement if the then existing cir-

cumstances warranted it (F.C.A. § 1062). Of course, the parents would have been denied the custody of their children in the interim but in balancing their interests against the best interests of the children, it is, I am afraid, a price they will have to pay. Prudence and caution counsel that the status quo remain undisturbed until the uncertainties concerning these children's future generated by the permanent neglect proceedings and the pending appeal be resolved.

Consequently, the Commissioner's application for an extension of the placement of all three children is granted and the placements will be extended for an additional period of one year, subject to whatever rights the respondents may have pursuant to section 1062 of the Family Court Act to petition for an earlier termination.

With respect to the respondents' order for the Commissioner to show cause why the parents should not be permitted to resume periodic visitation with their children while in foster care, I do not believe in spite of Dr. Lenore Sportsman's warnings concerning the effect these visits have upon the children's emotional health, that the Commissioner has shown sufficient cause for withholding them. The agency is under a statutory duty to make diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests[3] of the

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3. Formerly the criterion was that the efforts "not be detrimental to the moral and temporal interest of the child" (Family Court Act § 611, amended L. 1976, C. 666 § 14).

child" (Social Services Law § 384-b (7) (a); See also Volume 18 of the Codes, Rules and Regulations of the State of New York applicable to the Department of Social Services, particularly section 450.8 (6)).

"The best interests of the child" which is, of course, no where specifically defined, is perhaps an even broader concept than the phrase it replaced - "the moral and temporal welfare of the child." It is certainly broad enough to embrace considerations other than the child's emotional "hang-ups", i.e. depression, anxiety, fear of monsters and the like. In short, the court cannot, as the psychiatrist does, focus upon the child's emotional "hang-ups" to the exclusion of other valid considerations in deciding what is in "the child's best interests".

It is not contended that the parents' visits with their children have a deleterious effect upon them by reason of the parents' alcoholism, drug abuse, abusive or threatening behavior or by virtue of any moral defect of character. Rather the sole reason for denying visitation is that through the passage of time and lack of frequent contact the parents have become virtual strangers to their children, or in the language of the psychiatrist they have ceased to be the "psychological parents". Thus the very condition which the court created to save these children from their neglectful

parents - all of course presumably in their best interests - has bred and fostered the condition now complained of - an attenuated, almost non-existent parent-child relationship. The obvious defect in the whole foster care system - the separation and consequent alienation of children from their parents has fed upon itself and spawned a genie that no one knows quite how to put back into the bottle. Once again the Santoskys find themselves caught up in the "Catch 22" situation of being threatened with the loss of their children through failure to maintain contact and to plan for their children's future, while being denied access to their children because a psychiatrist has found parental visits to be an anxiety creating, emotionally disturbing experience for the children.

If these parents are to retain any hope whatever of ever regaining the custody of their own children and assuming once again their rightful responsibility for their upbringing, it is absolutely essential, in my judgment, that some contact, however tenuous, be maintained between parent and child, even if it is not an altogether happy experience for the child. Otherwise, the Department of Social Services has accomplished by indirection - all cloaked in the rubric of "the best interests of the child" what they have so far failed to accomplish by direction - for all practical purposes the termination of all parental rights through denial of access to

their own children. This should not be permitted to happen merely because in the opinion of a psychiatrist of some professional eminance the visits are confusing and emotionally upsetting to the children.

Unless and until these parents' rights to the custody and control of their own children are terminated permanently by an Appellate Court's reversal of this court's judgment or their rights are somehow terminated by a court of competent jurisdiction, these parents' right to maintain some kind of a meaningful contact with their own children should not be wholly cut off, even if these children do suffer some confusion and emotional "hang-ups" in the process.

Again, it is a matter of weighing competing interests and in my judgment the need for keeping the door ajar to the possibility of a full resumption of the parents' rights and responsibilities, at least until the appeal now pending involving these children is determined, outweighs any temporary emotional upset the children may suffer as a consequence.

It is simply beyond the ability of the law to provide every child with a perfect, or even near perfect, set of parents. The luck of the draw in the selection of one's parents is determined by a higher authority of whose wisdom and knowledge it is ex-

claimed: "how unsearchable are his judgments and his ways past finding out".[5] It is indeed deplorable that the Santosky children have had the misfortune to be born to parents who have so far proven themselves wholly inadequate to the task, but until these parents' rights to their own children are legally terminated it is a misfortune they will simply have to bear.

Consequently, since I find that it will not be detrimental to the child's best interests for the agency to continue diligent efforts to encourage and strengthen the parental relationship, the Commissioner of Social Services and his authorized deputies are hereby ordered, until the determination of the appeal in the permanent neglect proceedings now pending, to permit the respondents to visit with each of their children now in foster care at least twice a month, for a minimum of two hours per visit, subject to the further order of the court upon the determination of the appeal. (F.C.A. § 255; In re Edward M., 76 Misc. 2d 781, affd. sub. nom. in re Murray, 45 A D 2d 906; Usen v. Sipprell, 41 A D 2d 251).

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5. Romans. 11:33.

Dated: June 27, 1977.

Sec. 631 F.C.A.

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

PRESENT: HON. HUGH R. FLAVIN
Judge

In the Matter of

TINA FRANCES APEL

A Child under the Age of Eighteen Years, Alleged to be a Permanently Neglected Child.

Docket No. B-3-79

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Tina Frances Apel is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santocky, the parent(s) (~~custodian(s)~~) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) (~~custodian(s)~~) having appeared (~~having failed to appear~~) thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) ~~Custodian(s)~~ having appeared (~~having failed to appear~~) thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that Tina Frances Apel is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') ~~custodian(s)~~ custody of the child be terminated permanently, it is

*ORDERED that the custody of Tina Frances Apel the parent(s) (~~custodian(s)~~) of said child, over said child be and the same hereby is terminated permanently; and it is further ~~ORDERED~~

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commissioner of Social Services the Petitioner herein (upon the following terms and conditions: that the Commissioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

**IT IS ORDERED that judgment be and the same hereby is suspended upon the terms and conditions specified in the appendix annexed to this order and made part hereof.

ENTER,

J.F.C.

*These provisions are eliminated if judgment is suspended.
**This provision is eliminated if judgment is not suspended.

Best Copy Available

§ [illegible], 631 F.C.A. Form 6-1-5 (Permanent Neglect)

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

PRESENT: HON. HUGH R. [illegible]
Judge

In the Matter of

JOHN SANTOSKY III

A Child under the Age of Eighteen Years, Alleged to be a Permanently Neglected Child.

Docket No. B-4-78

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that John Santosky III is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky, the parent(s) (Custodian(s)) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) (Custodian(s)) having appeared (having failed to appear) thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) (Custodian(s)) having appeared (having failed to appear) thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that John Santosky III is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent's) (Custodian's) custody of the child be terminated permanently, it is

*ORDERED that the custody of John Santosky III, the parent(s) (Custodian(s)) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commisioner of Social Services the Petitioner herein (upon the following terms and conditions: that the Commisioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

IT IS ORDERED that judgment be and the same hereby is suspended upon the terms and conditions specified in the appendix annexed to this order and made part hereof.

ENTER,

J.F.C.

*These provisions are eliminated if judgment is suspended.
**This provision is eliminated if judgment is not suspended.

Sec. 631 F.C.A.

Form 6-1-5 (Permanent Neglect)

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

PRESENT: HON. HUGH R. ELWIN
Judge

In the Matter of

JED CONRAD SANTOSKY

A Child under the Age of Eighteen Years, Alleged to be a Permanently Neglected Child.

Docket No. B-5-73

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Jed Conrad Santosky is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky, the parent(s) (custodian(s)) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) (custodian(s)) having appeared (having failed to appear) thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) (custodian(s)) having appeared (having failed to appear) thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that Jed Conrad Santosky is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') (custodian's(s')) custody of the child be terminated permanently, it is

*ORDERED that the custody of Jed Conrad Santosky the parent(s) (custodian(s)) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commisioner of Social Services the Petitioner herein (upon the following terms and conditions: that the Commissioner provide supportive help to the child and Foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

).

~~*IT IS ORDERED that judgment be and the same hereby is suspended upon the terms and conditions specified in the appendix annexed to this order and made part hereof.~~

ENTER,

J.F.C.

*These provisions are eliminated if judgment is suspended.
**This provision is eliminated if judgment is not suspended.

FAMILY COURT
of the
STATE OF NEW YORK
COUNTY OF

IN THE MATTER OF

3 Mo. No. 797

In the Matter of
Tina Frances Apel, John Santosky III and Jed Conrad Santosky, children &c. Alleged to be Permanently Neglected Children.

Bernhardt S. Kramer, Commissioner Ulster County Department of Social Services,

—Respondent,

John Santosky II and Annie Santosky,

Appellants.

Motion to dismiss appeal granted and appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

DENISTON COURT OF APPEALS SEP 16 1980

SEP 18 1980

AT a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 17th day of March, 1980.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

In the Matter of TINA FRANCES APEL, JOHN SANTOSKY III and JED CONRAD SANTOSKY, children under the age of eighteen years alleged to be Permanently Neglected Children.

ORDER

BERNHARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,

36228

Petitioner-Respondent,

JOHN SANTOSKY II and ANNIE SANTOSKY,

Respondents-Appellants.

The appellants having appealed from a judgment of the Family Court of Ulster County (ELWYN, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act, and said matter having been presented during the above-stated Term of this Court, and after due deliberation the Court having rendered a decision on May 1, 1980, it is hereby

ORDERED that the judgment appealed from be affirmed, without costs.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: May 7, 1980

A TRUE COPY

/s/ John J. O'Brien
Clerk

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 5889

JOHN SANTOSKY II and ANNIE SANTOSKY

Petitioners

v.

BERNHARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services,
et al.

Respondent

On Petition for a Writ of Certiorari to
the Supreme Court of the State of New York,
Appellate Division, Third Department

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 5889

JOHN SANTOSKY II and ANNIE SANTOSKY

Petitioners

v.

BERNHARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services

Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of the State of New York,
Appellate Division, Third Department

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The relevant opinions which disposed of this case in the New York State Courts are contained in Petitioner's Appendices A, B, and D.

JURISDICTION

The decision of the New York State Court of Appeals was entered on September 16, 1980. The petition for a writ of certiorari was received by the Respondent on December 11, 1980. The jurisdiction of this Court is invoked under 28 USC §1257(3). At issue in this case is the constitutionality of a state statute. Thus, 28 USC §2403(b) may be applicable.

QUESTION PRESENTED

Whether, in a proceeding to terminate parental rights, such rights may be terminated based upon a preponderance of the evidence standard.

STATUTE INVOLVED

The provisions of the New York Family Court Act, Section 622, are attached as Appendix A.

STATEMENT

The petition in this case represents the final stage in a long controversy surrounding the Santosky children. The children, John, Jed, and Tina, have been placed in foster care since 1974. Mr. and Mrs. Santosky have consistently failed to maintain adequate contacts with their children since that time (Pet. App. B-3). Such treatment led one expert to conclude that the relationship between the Santosky's and their children was devoid of any real emotional contact. More importantly, the expert sought to curtail any further contact on the grounds that it was detrimental to the children. Accordingly, the trial court found that (i) the Santosky children regard their natural parents as strangers and (ii) the children viewed parental meetings merely as something to be endured.

The hearing below terminated the parental rights of Mr. and Mrs. Santosky based upon permanent neglect. In its opinion, the Court below considered Respondent's attempts to assist Mr. and Mrs. Santosky keep their children. Aid from the Department consisted of arranging meetings between Petitioner's and their children, educational assistance, psychiatric treatment, and vocational assistance. The aid totaled in excess of $16,000 over a period of three years. The Court noted,

> "In short... ever since the Santosky children have been in foster home placement, the parents have not only had offered, but diligently urged upon them every social service available in Ulster County which could conceivably have helped the Santosky's in achieving a goal of eventual reunion of the family." (Pet. App. B-21).

In spite of these efforts, the Court found that Mr. and Mrs. Santosky's parental ability and skill was non-existent, and terminated the parental rights accordingly (Pet. App. B-22).

From that juncture, the case was brought through the Appellate system of the New York State Courts. The sole question in any of the appellate proceedings was whether a preponderance of the evidence standard was constitutional. The Appellate Division of the Supreme Court of New York held that such a standard was proper (Pet. App. A-1). The New York State Court of Appeals, in turn, affirmed the holding of the lower appellate court (Pet. App. D-1).

ARGUMENT

Respondent's position is grounded upon four basic assertions. First, the evidentiary standard governing termination of parental rights is an issue which lies within the sound discretion of the individual state legislatures. It does not invoke constitutional considerations which warrant review. Thus, where the legislature has spoken, as it did in the instant case, that decision should not be overturned by the judiciary. Secondly, the standard of proof chosen by the New York State legislature is legally correct. Third, assuming arguendo that the issue is reviewable, it is already before this Court in Doe v. Delaware, Docket No. 79-5932. As the issue turns on purely legal considerations, granting this petition, and its accompanying set of facts, will not aid in the disposition of the question. Finally, the decision below should be allowed to stand as it is factually correct.

A. The question raised by the petition does not present a substantial federal question.

Petitioners correctly cite several major cases for the proposition that freedom of personal choice in matters of family life is one of the liberties protected by the due process clause of the fourteenth amendment. E.g., Cleveland Board of Education v. La Fleur, 434 U.S. 246, 255 (1978). Petitioners have further

cited cases in which the Court has held that a preponderance of the evidence standard did not satisfy due process requirements where utilized in certain adjudicatory settings. In re Winship, 397 U.S. 358 (1970) (juvenile delinquency proceeding); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment proceeding). Nonetheless, it does not follow that the Court should review the standard of proof necessary to terminate parental rights by reason of the permanent neglect of the parents' children pursuant to the New York Family Court Act, Art. 6.

As noted by Justice Harlan concurring in Winship, "the choice of the standard to be applied in a particular kind of litigation should...reflect an assessment of the comparative social disutility of each." 397 U.S. at 371. The due process clause dictates, therefore, that a juvenile delinquency adjudication must be determined by proof beyond a reasonable doubt in a society where it is far worse to convict an innocent man than to let a guilty man go free. Winship, 397 U.S. at 372 (J. Harlan concurring). By analogy, a state's choice of a standard of proof in a proceeding to terminate parental rights is an assessment of whether it is far worse to terminate the rights of a worthy parent than to risk further harm to a permanently neglected child. But unlike the standard of proof in a criminal case which is firmly grounded in fundamental values of American jurisprudence, one cannot compare the social disutility of these two erroneous outcomes and come to a fundamental value determination that erroneous reverance of parental rights have a greater social disutility than erroneous failure to sever. Hernandez v. Arizona, 23 Ariz. App. 32, 530 P.2d 389, 393 (1975).

Simply stated, the values that should be embodied by a standard of proof in a termination of parental rights proceeding, are not a matter of general principles of due process. Rather, such values represent an important determination of state public policy which result from a consideration of the relative interests

of parent and child.

It is the state legislature, and not the judiciary, which is in the best position to set such policy. Cf Huey v. Lente 85 N.M. 585, 592, 514 P.2d 1081, 1088, aff'd 85 N.M. 597, 514 P.2d, 1093 (1973). (J. Hernandez concurring) (court will set standard where no express indication that legislature intended a different result).

B. The decision below is not in conflict with twenty-two state appellate courts and two federal courts as stated by petitioners.

In many of the state cases cited by petitioners, the appeals court was confronted by a termination statute that did not delineate the standard of proof. In such cases the court set out a standard based not upon due process grounds but rather upon state precedent and a weighing of the relative interests of parent and child. E.g., Matter of Adoption of J.S.R., 374 A.2d 860, 864 (D.C. 1977) (high standard of proof is warranted although not constitutionally mandated); In re Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973). The courts in these cases, therefore, were required to set public policy because of legislative inaction.

In contrast to those cases, and the Delaware statute in Doe, the New York legislature has made a public policy determination concerning the comparative rights of parent and child in a termination hearing. Accordingly, further action on the part of the New York courts was not necessary.

Additionally, petitioners have been disingenuous in their characterization of several state and federal cases. In Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976) (Per Curium), the court succinctly upheld the district court without reaching the issue of the appropriate standard of proof. In re Kelly, 262 N.W. 2d 781 (Iowa 1978) did not involve a raising of the necessary standard of proof. The court merely found that the trial court had failed to apply a "clear and convincing" test as expressly required by the relevant Iowa statute. Finally,

it should be noted that contrary to petitioner's implication, Arizona has not raised the standard of proof in termination hearings. The relevant statute provides for proof by a preponderance of the evidence and this statute has not been disturbed by Arizona courts. Hernandez v. Arizona, 23 Ariz. App. 32, 530 P.2d 389, 393 (1975).

C. The New York termination statute salutes due process requirements.

Even assuming arguendo that this Court rather than the New York Legislature is the appropriate forum for placing a value upon the relative rights of parent and child in a termination hearing, the result of the instant case would not be altered. It is ironic that petitioners discuss in great detail the Court's discussion of the due process rights of juveniles in Winship; yet they fail to mention the rights of juveniles in a parental termination proceeding.

However, any due process analysis must consider the private interests which will be affected. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Thus, Petitioners' due process rights become attenuated when opposed by the interests of their children. See Smith v. Organization of Foster Families, 431 U.S. 816 (1977). In the instant case, the rights of the parent cannot be said to overcome the right of a neglected child to be severed from a relationship with an unfit parent. Furthermore, the state has the right and duty to protect infants who are unable to protect themselves, Ginsberg v. New York, 390 U.S. 629 (1968), and to compel parents and children alike to act in ways beneficial to society. See Kleinfield, The Balance of Power Among Infants, Their Parents and The State, 4 Fam. L.Q. 320 (1970). Accordingly, the due process rights of the petitioners have not been violated.

D. The Petition should not be granted as this question is already before the Court.

Assuming arguendo that this Court finds the issue to be of constitutional significance mandating review, this Petition still should not be granted. As Petitioner notes, the same question presented here is already at issue in Doe v. Delaware Docket No. 79-5932.[1] Obviously, the issue raised is strictly legal. As such, it does not turn on the individual facts and circumstances of Petitioner's case or any other for that matter. Therefore, scheduling this case for briefs and oral argument would confer no benefit upon the Court, but it would be of great hardship to the Respondent. Holding this Petition until Doe is decided would not prejudice Petitioner's case. See the result reached in Vanderlaan v. Vanderlaan 405 U.S. 1051 (1972) based upon the decision of Stanley v. Illinois 405 U.S. 645 (1972).

E. The decision below should be allowed to stand as it is correct on the facts.

Furthermore, Respondent urges that this case is not appropriate for review as the decision is factually correct. After several years of assistance, Petitioner's are still incapable of adequately raising children. Far more importantly, John, Jed and Tina have been in foster care for over six years and are awaiting adoption. They now regard their natural parents as strangers. The decision, permanently terminating parental rights, places the children and the Petitioner as strangers in the eyes of the law. Thus, the law now conforms, as it should, to the children's deepseated feelings and beliefs.

---

[1] There should be no question that the issue is already before the Court in Doe. The validity of the preponderance of the evidence standard was brought to the attention of the Delaware Courts. It was squarely upheld in the face of a claim that it is unconstitutional. Thus, the preponderance of the evidence standard was ruled on below in the Delaware state courts. See Douglas v. Alabama 380 U.S. 415, 422 (1965) and Toliver v. Wyrick 469 F. Supp. 583, 600 (W.D. Mo. 1979).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

§ 615. Repealed. L.1976, c. 666, § 15, eff. Jan. 1, 1977

Section, which related to person who may originate proceedings, was added L.1962, c. 686; amended L. 1973, c. 804, § 6. The subject matter is now covered by Social Services Law § 384-b.

§ 616. Issuance of summons

On the filing of a petition under this part, the court may cause a copy of the petition and a summons to be issued, requiring the parent to show cause why the court should not enter an order committing the guardianship and custody of the child to the petitioner for the reason that the child is permanently neglected.
As amended L.1976, c. 666, § 17.

1976 Amendment. L.1976, c. 666, § 17, eff. Jan. 1, 1977, provided for order committing guardianship and custody to the petitioner in place of an order depriving parent of all rights of custody and awarding custody to petitioner.

Effective Date of 1976 Amendment; Accrued Rights and Interests. See "Effective Date; Accrued Rights and Interests" note under Social Services Law § 384-b.

§ 617. Service of summons

[See main volume for text of (a) and (b)]

(c) Personal service within or without the state or in a foreign country shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act, as the same may be amended from time to time, with respect to service of a citation.

(d) Service of the petition and other process by publication shall be made in accordance with the provisions of CPLR 316, provided, however, that a single publication in only one newspaper designated in the order shall be sufficient.

As amended L.1976, c. 666, §§ 18, 19.

1976 Amendment. Subd. (c). L. 1976, c. 666, § 18, eff. Jan. 1, 1977, omitted provisions relating to service by publication.

Subd. (d). L.1976, c. 666, § 19, eff. Jan. 1, 1977, added subd. (d).

Effective Date of 1976 Amendment; Accrued Rights and Interests. See "Effective Date; Accrued Rights and Interests" note under Social Services Law § 384-b.

§ 622. Definition of "fact-finding hearing"

When used in this part, "fact-finding hearing" means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of subdivision one of section six hundred fourteen are supported by a fair preponderance of the evidence.
As amended L.1976, c. 666, § 20.

1976 Amendment. L.1976, c. 666, § 20, eff. Jan. 1, 1977, denominated proceeding as petition for the commitment of the guardianship and custody of a child in lieu of petition permanently to terminate custody.

Effective Date of 1976 Amendment; Accrued Rights and Interests. See "Effective Date; Accrued Rights and Interests" note under Social Services Law § 384-b.

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1. Constitutionality

This section and sections 611, 614 dealing with infants who are permanently neglected were not unconstitutional in failing to define conduct of

Office-Supreme Court, U.S.
FILED
APR 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5889

In the Supreme Court of the United States
OCTOBER TERM, 1980

JOHN SANTOSKY II AND ANNIE SANTOSKY,
PETITIONERS,

v.

BERNHARDT S. KRAMER, COMMISSIONER,
ULSTER COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 13, 1980.
CERTIORARI GRANTED MARCH 23, 1981.

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Petitions for Commitment of Guardianship and Custody—Permanent Neglect Filed in Family Court on October 16, 1978.

Fact-finding Hearing Held in Family Court on January 23, 26, 31 and February 1, 1979.

Decision of Fact-finding by Family Court Rendered on March 12, 1979.

Decision of Disposition by Family Court Rendered on April 5, 1979.

Final Order Terminating Parental Rights as to the Three Children Entered in Family Court on April 5, 1979.

Notice of Appeal to Court of Appeals from Family Court Order Filed on April 24, 1979.

Stay of Enforcement of Family Court Order Entered in Family Court on May 18, 1979.

Order of Court of Appeals Transferring Case to Appellate Division, Third Department Entered in June 14, 1979.

Decision of Appellate Division, Third Department Affirming Orders of Family Court Rendered on May 1, 1980.

Order of Appellate Division, Third Department Affirming Orders of Family Court Entered on May 17, 1980.

Notice of Appeal to Court of Appeals from Order of Appellate Division, Third Department Filed on May 20, 1980.

Order of Court of Appeals Dismissing Appeal Entered on September 16, 1980.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

(Commitment of Guardianship and Custody—
Permanent Neglect) 5/77

Docket No. B-375-78

In the Matter of the Commitment of Guardianship and Custody pursuant to §384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY Children under the Age of Eighteen Years Alleged to be Permanently Neglected Children

PETITION

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner(s) Bernhardt S. Kramer, Commissioner (is) (an authorized agency) having (its office and place of business) at 240 Fair Street, Kingston, in the County of Ulster, State of New York.

2. Tina Frances Apel is a (fe)male child under the age of eighteen years, born on August 15, 1971 at Kingston, New York who now resides in the County of Ulster, State of New York. (*SEE ATTACHED SHEET*)

3. The full name and the address of each parent and custodian of said children are:

Name	*Last Known Address*
ANNIE APEL SANTOSKY (Tina, John and Jed)	P.O. Box 228, Accord, NY
JOHN SANTOSKY II (John and Jed)	P.O. Box 228, Accord, NY

4. The name and the address of each other interested party who should be afforded notice of this proceeding are:

Name	*Last Known Address*

There are no persons other than those listed above entitled to notice pursuant to Sections 384-b and 384-c of the Social Services Law.

5. Said children came into the care of Bernhardt S. Kramer, Commissioner of Social Services, an authorized agency, under the following circumstances: Tina Frances Apel was temporarily placed in the custody of the petitioner on October 10, 1973. She was adjudicated a Neglected child on November 26, 1973, and placed in the care and custody of the Petitioner. The Order of Placement has been extended on several occasions and she is presently in the custody of the petitioner. (SEE ATTACHED SHEET)

6. (S)aid authorized agency has made diligent efforts to encourage and strengthen the parental relationship in that (SEE ATTACHED SHEET)

(Specify the efforts made or the reasons such efforts would be detrimental to the best interests of the child.)

7. (N)otwithstanding such efforts), the (parent(s)) (have) failed for a period of more than one year following the date the children came into the care of Petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of each child although physically and financially able to do so.

8. The best interests of said child require the commitment of the guardianship and custody of each child to Petitioner, (an authorized agency) for the following reasons:

(if appropriate, include facts regarding a non-respondent parent)

(SEE ATTACHED SHEET)

9. No previous petition has been filed for the relief sought herein (except petitions alleging Permanent Neglect were filed on September 8, 1976, followed by a trial on November 16–18, 1976, and an Order of Dismissal on February 22, 1977. The grounds for the present petition have arisen subsequent to the earlier action.

WHEREFORE, your Petitioner prays for an order adjudicating the above-named children a permanently neglected children and committing such guardianship and custody of the children to Petitioner, (an authorized agency),

and for such other and further relief as in the interests of child may be granted.

Dated: October 16, 1978

Ulster County Department of Social Services
(Agency)
(by

/s/BERNHARDT S. KRAMER
Commissioner

VERIFICATION

STATE OF NEW YORK

: ss.:

COUNTY OF ULSTER

being duly sworn, says that (s)he is the Petitioner in the above-named proceeding and that the foregoing Petition is true to (his) (her) own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters (s)he believes it to be true.

BERNHARDT S. KRAMER
Petitioner

Sworn to before me this
16th day of October, 1978.

/s/ _____
BURTON GULNICK
(Deputy) Clerk of the Court
Notary Public

In the Matter of

TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY

Children under the Age of Eighteen Years
Alleged to be Permanently Neglected children

2. (continued)

John Santosky III is a male child under the age of eighteen years, born on August 22, 1973, at Kingston, NY, who now resides in the County of Ulster, Statre of New York.

Jed Conrad Santosky is a male child under the age of eighteen years born on August 19, 1974 at Kingston, NY, who now resides in the County of Ulster, State of New York.

5. (continued)

John Santosky III was temporarily placed in the custody of petitioner on August 19, 1974. He was adjudicated a Neglected child on September 30, 1974, and placed in the custo-

5. (continued)

dy of petitioner. The Order of Placement has been extended on several occasions and he is presently in the custody of petitioner.

Jed Conrad Santosky was temporarily placed in the custody of petitioner on August 22, 1974. He was adjudicated a Neglected Child on September 30, 1974, and placed in the custody of petitioner. The Order of Placement has been extended on several occasions and he is presently in the custody of petitioner.

6. (continued)

(a) The petitioner arranged to bring the children to the Santosky's for visits with the respondents on an average of twice a month.

(b) The petitioner encouraged the respondent, Annie Santosky to attend the Child Enrichment Program offered by Family Service Center to mothers with pre-school children, and which program included the use of a parent aid. Transportation to the program was also offered.

(c) The petitioner arranged for and paid for psychological evaluations of both respondents, and a complete neurological evaluation of respondent, John Santosky, at St. Frances Clinic, Poughkeepsie. Transportation was also provided.

(d) The petitioner offered follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.

(e) The Petitioner arranged for counselling sessions for respondents with Elizabeth Smith of Family Service Center.

(f) The petitioner offered birth control counseling at Planned Parenthood.

(g) The petitioner offered vocational training to the Respondent, John Santosky through the Office of Vocational Rehabilitation.

(h) The petitioner offered educational assistance to Respondent, John Santosky at the Adult Learning Center.

(i) The petitioner has provided nutrition aid services to respondent Annie Santosky since November 1977.

6. (continued)

(j) The petitioner offered Homemaker Service to help the respondents immediately prior to and after the birth of the recent infant in June, 1978.

(k) The petitioner has provided Public Assistance, Food Stamps and Medicaid to the respondents. The total value of all services offered to the respondents since November 1976 exceeds $16,000.

8. (continued)

1. Respondents cannot or will not provide a normal family home for the children.

2. Each of the children has been in foster care for a continuous period in excess of four years and continued foster care is not an appropriate plan.

3. Professional psychiatric consultants have evaluated the children and have advised that a permanent alternative home should be sought for the children.

FAMILY COURT: STATE OF NEW YORK
COUNTY OF ULSTER

IN THE MATTER OF

TINA FRANCES APEL
JOHN SANTOSKY, III
JED CONRAD SANTOSKY

children Alleged to be Permanently Neglected Under Section 384-b of the Social Services Law.

NOTICE TO ATTORNEY GENERAL

TO THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK:

SIR:

PLEASE TAKE NOTICE that pursuant to Executive Law, Section 71, John Santosky & Annie Santosky, Respondents in the above entitled action, intend to assert on the hearing of the above-captioned matter that the Family Court Act and Social Services Law of New York are unconstitutional, on the grounds that they require a standard of proof based on a preponderance of the evidence rather than upon clear and convincing evidence, in violation of the Due Process Clauses of Article I, Section 6 of the New York Constitution and Amendment 14 of the United States Constitution.

Yours, etc.

RICKEN, GOLDMAN, SUSSMAN & BLYTHE
Attorneys for Respondents
14 Pearl Street
Kingston, New York 12401
Tel. No. (914) 339-3050

FAMILY COURT—ULSTER COUNTY

PETITIONER'S EXHIBIT 1 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

Case Name: Santosky, John and Annie

The following is an accounting of assistance granted from 12/1/76 to 9/30/78:

Public Assistance	$9,120.00
Medicaid	2,633.72
Nutrition Aide	150.00
Counseling Service	300.00
Child Welfare Caseworker Counseling	3,135.00
	$15,338.72

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 2 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

January 16, 1979

Bernhardt. S. Kramer
Commissioner of Social Services
Ulster County Dept. of Social Services
County Office Building
Kingston, New York 12401

RE: SANTOSKY, JOHN III
BORN: 8/23/73
C.A. 5–3
Tested: 11/20/78

Dear Commissioner Kramer:

John was again evaluated by the psychologist and psychiatrist. Current Stanford Binet (M.A. of 6–0; I.Q. of 116) is in keeping with former results.

John's behavior is more stable and comfortable and self assured. He is less defensive and more direct in his responses. As a consequence, we feel that John is going to become more direct and probably more rebellious toward pressure. The projectives also suggests the developmentally usual feelings of guilt where John tends to blame himself for almost anything and consequently focuses on attempts to avoid blame—but in his need for self assertion and "independence" can easily get into minor difficulties. It is interesting to note that John's need for "independence" is really an attempt to inure himself from closeness to people since he perceives adults as hurtful. "He don't like his real mother and father. Sometimes he don't want to live no where. He make his own house."

Since we have evaluated both Tina and John the same day, we are most impressed with similarity of their development. Both are moving toward an "intellectual" solution where feelings of closeness and trust in adults are seen as dangerous and to be avoided. The way things are developing

unless there is a definite decision with a built-in program of helping parents understand and cope with these children, we anticipate future developmental difficulties. These are both, for their ages, oversophisticated children who are learning how to manipulate others so as to survive and consequently, are going to require rather sophisticated understanding if we are to help modify their patterns into a more comfortable type of adoption.

Sincerely,

/s/ _____

LENORE M. SPORTSMAN, M.D.
Director

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 3 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

January 16, 1979

Commissioner Benhardt S. Kramer
Ulster County Dept. of Social Services
County Office Building
Kingston, New York 12401

RE: APEL, TINA
BORN: 8/15/71
C.A. 7–3
Tested: 11/20/78

Dear Commissioner Kramer:

We have been involved in following Tina's progress and continuing to evaluate her for the past few years. As you know, she is a bright girl (Stanford Binet I.Q. of 120, Raven's I.Q. the same) who we felt was reacting to the uncertainty of her situation. She had identified the natural parents as "hurting parents" and clearly symbolized her feelings of being caught in-between natural parents and foster parents. We suggested that she was moving toward a neurotic resolution of her problem. Current psychological and psychiatric evaluation now indicates a masked abatement of anxiety and a much more comfortable adjustment since Tina has really resolved the problem for herself. She has come to the decision that she would no longer feel guilty over not wanting to return to her natural parents. This is a clearcut psychological decision and as such acts as a powerful protective force that her natural parents are no longer given, by Tina, the power to affect her significantly. Now she will probably manipulate them, more as objects than as people. She is very clear in indicating that "she won't listen" to her natural parents. I suspect that, to a degree, this will also carry over onto her foster parents. Nor do we feel that any psychological intervention will change things for Tina as long as there is no resolution to her current situation. Thus, we anticipate

that Tina's neurotic resolution will become more fixed as time goes on and that the consequence is for Tina to continue to strengthen her resolution not to allow herself to become emotionally close to people. This need to defend herself against anticipated emotional hurt is a neurotic element that will most certainly detract from her future happiness and/or her future capacity to provide optimal mothering—if and when she becomes a mother. Ideally, this child should be released for adoption with provisions for adoptive parents to be worked with so as to break into Tina's movement away from closeness.

Sincerely,

/s/_____

LENORE M. SPORTSMAN, M.D.
Director

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 4 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

January 16, 1979

Commissioner Bernhardt S. Kramer
Ulster County Dept. of Social Services
County Office Building
Kingston, New York 12401

RE: SANTOSKY, JED
BORN: 8/19/74
C.A. 4–3

Dear Commissioner Kramer:

Jed was currently evaluated at our Agency on November 11, 1978. He has been evaluated a number of times previously so that we could continue working with his social worker and foster parents in order to maintain his emotional health as he progressed through the various developmental stages.

Jed is a beautiful child with startling blond hair and blue eyes. He separated easily and related appropriately. Former I.Q. on the Stanford Binet was 123 while current results indicated a M.A. of 5–11; I.Q. 138. Obviously, we have a precocious child. Since he is so bright, we also note that he is now in the so called "oedipal" stage. This is reflected in his oversensitivity to guilt since it is a stage where children tend to blame themselves for most problems and, consequently, take the defensive position of "I didn't do it" or "I don't know" even though one is not criticizing them. Thus, we would expect Jed to be more sensitive and more easily hurt currently.

Jed clearly identifies "Sandy and Jack" as his real mother and father. When I asked who "Anne" was he responded, "Foster mother", but had no idea what a foster mother is. There is no question but that "Sandy and Jack" (his foster parents) are perceived psychologically and overtly, as his parents and that separation from them would have serious emotional consequences. We also feel that Jed's current sensitivity and the related anxiety is in major part related to

rise in anxiety experienced by the foster parents because the case is reopened and again going to the court for a decision. We again suggest that any questions Jed might raise concerning relationships be answered factually and that no special attempts be made to fill him in on the details of his background and/or the current state of affairs, unless he asks directly, since the situation is still unresolved and trying to "educate" him will only serve to confuse Jed.

If we may be of further service, please feel free to contact us.

Sincerely yours

/s/ _____

LENORE M. SPORTSMAN, M.D.
Director

FAMILY COURT—ULSTER COUNTY

PETITIONERS EXHIBIT 5 FOR IDENTIFICATION
ULSTER COUNTY FAMILY COURT
ACCEPTED IN EVIDENCE

STATE OF NEW YORK

ss.:

COUNTY OF ULSTER

ELIZABETH SMITH, being duly sworn, deposes and says:

I am director of the Family Service Center of the Children's Home, and I hold the degree of Master of Social Work.

Since March 22, 1976 I have met with and counselled John Santosky and Annie Santosky on a more or less regular basis. From November 29, 1976 to May 22, 1978 I met with and counselled Mr. and Mrs. Santosky on 28 occasions.

At a hearing in the matter concerning the alleged permanent neglect of Tina Apel, Jed Santosky, and John Santosky, III conducted in November, 1976 I testified that Mr. and Mrs. Santosky were not then ready to accept the immediate return of the three children. Mr. and Mrs. Santosky are the parents of a fourth child, James, who resides with them at their home. At that time, I recommended the gradual return of the children one at a time. This was not done.

Since my last giving testimony in this matter Annie Santosky has given birth to a fifth child. This child was born on June 9, 1978.

Since the hearing in November, 1976 I continued to be involved with the Santoskys, and they did some good things in the areas of physical health care for James and educational training for Mr. Santosky. I was concerned about the restrictive nature of their care of James but was unable to effect this. Only the intervention of the Child Protective worker and the Public Health nurse created sufficient pressure so that James was permitted to be out of the playpen and more mobile. Thus, he has within the last six months

begun to accomplish developmental motor tasks appropriate to his age. He does not, however, have the language capability I would expect of a child of two and a half years.

As a means of helping James to learn and helping Mrs. Santosky to recognize his needs and to encourage his development, I strongly recommended their membership in the Children's Enrichment Program—a program specifically designed to deal with the problems of parent-child relationships and the growth and development of children. However, Mr. and Mrs. Santosky refused to permit such participation fearing that someone would abduct James when Mrs. Santosky was occupied in a different area. These fears and lack of trust which are unreasonable and unrealistic make it impossible for the Santoskys to utilize community services which afford the potential of significant benefits for the family, and specifically for James, and for which there are no compensating resources at home. Thus, James still seems subject to many restrictions the effect of which will be inadequate completion of developmental tasks. This preoccupation with themselves and their apprehensions creates an inability to perceive their child as needful of their active reaching out to seek new and expanding experiences for him. At times this seems to me like neglect.

As we again face the necessity of considering the situation of the three Santosky children in care, I see four major factors that need to be considered:

1. The Santoskys' passivity in seeking and participating in activities intended to be helpful to them (In the main, I see them only if I am able to go to their home as they have made numerous excuses as to why they could not keep appointments at my office);
2. The Santoskys' restrictive parenting practices which inhibit normal development in their child;
3. The Santoskys' fears which preclude participation in activities outside their own family group.
4. The recent birth of a fifth child which adds to the demands made upon both Mr. and Mrs. Santosky.

The foregoing factors provide contraindication to the return of any of the children to the Santosky home within the foreseeable future.

/s/_____
ELIZABETH SMITH

Sworn to before me this 7th day of July, 1978

/s/_____
BURTON GULNICK
Notary Public

STATE OF NEW YORK FAMILY COURT: ULSTER COUNTY

Docket Nos. B-3-4-5-78.

In the Matter of the Commitment of Guardianship and Custody pursuant to § 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED CONRAD SANTOSKY, children under the age of Eighteen Years alleged to be Permanently Neglected Children.

January 26, 31, February 1, 1979

RICHARD W. GRIGGS, Attorney for Commissioner of Social Services.

ALAN SUSSMAN, Attorney for Respondents.

MARRIN & SMYTH, (WILFRID E. MARRIN, of Counsel), Attorneys for Foster Parents.

JAY SAMOFF, Law guardian.

HUGH R. ELWYN, J: This case represents a second attempt[1] by the Commissioner of Social Services of Ulster County to terminate permanently the parental rights of John and Annie Santosky by reason of the permanent neglect of their three children. (Family Court Act, Art. 6). Each of these three children have been previously adjudicated to be neglected children within the meaning of Article 10 of the Family Court Act and placed with the Commissioner of Social Services for an initial period of 18 months, subject to the further order of the court. Tina Frances Apel, now age 7, has been in foster home placement since November 20, 1973; John Santosky, now age 5, since September 30, 1974 and Jed Conrad Santosky, now age 4, since September 30, 1974. The placement of these three children has twice been extended (Family Court Act § 1055), the

[1] For the result of the first attempt see Matter of Santosky, 89 Misc. 2d 730, affd., 63 AD2d 750.

latest extension being on June 14, 1977, and a third application for an extension of placement filed June 13, 1978 is currently pending with this proceeding. The Court takes judicial notice of its own records that relate to the proceeding before it (Matter of Denlow, 87 Misc. 2nd 410, 411–412 and cases there cited).

This proceeding instituted pursuant to Section 384–b of the Social Services Law (L. 1976, c 666, effective January 1, 1977)[2] was initiated by the filing of a petition on October 16, 1978 pursuant to subd. 4(d) of that law and Article 6 of the Family Court Act. The Petition contains all of the necessary allegations required by Section 614 of the Family Court Act.

Although the petition alleges, after detailing the agency's diligent efforts to encourage and strengthen the parental relationship, that "notwithstanding such efforts, the parents have failed for a period of more than one year following the date the children came into the care of the petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d), it was not contended nor was any proof offered at the trial that the parents had failed to maintain contact with their children. On the contrary it is conceded they have through their counsel, diligently sought to have permitted to them such contact through supervised visits as the agency would allow. At one point in these proceedings the Agency, upon advice of their expert consultant in child psychiatry, sought to curtail altogether the parents' contact with their children in foster care upon the ground that such visitation was confusing and even detrimental to the children's emotional well being. The parents' right to maintain contact with their children through periodic visitation was restored only through the intervention of the court.[3]

[2]This statute had been enacted, but was not effective at the time of the earlier trial in this case which occurred in November 1976.

[3]See written, but unpublished, decision of this court, dated June 27, 1977, pp. 10–14. Appendix A.

However, the proof in this case shows that on some sixteen occasions when visits with their children were scheduled the father was from twenty minutes to an hour late and on one occasion when fire engines passed the house found them momentarily more demanding of his time and attention. In any event, such visits as did take place between the parents and their children were at best superficial and devoid of any real emotional content, and were probably wholly meaningless from the standpoint of the children who have come to view their real parents as strangers and their meeting with them as something only to be endured. From the caseworker's description of the infrequent visits that have occurred the court finds such visits to have been "of such character as to overtly demonstrate a lack of affection and concerned parenthood" (Social Services Law, § 384-b, subd. 7 (b). Such visits "shall not be deemed a substantial contact". (Social Services Law, § 384-b subd. 7(b). Moreover, it is noted that the same subdivision of section 384-b of the Social Services Law declares that: "(F)or the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child." Consequently, the court could, even though the point is not seriously urged by the Commissioner, find the children to be permanently neglected, on that ground alone (Matter of Orlando, 40 N.Y. 2d 103).

The Commissioner has elected, however, as in the first case, to predicate his contention that the children have been permanently neglected solely upon the parents' "failure to plan for the future of their children" (F.C.A. §§ 611, 614, subd. 1, (d)) "The statute * * * is stated in the disjunctive and, thus, even though parents may maintain contact with their children the failure to plan for the future of the children, in and of itself, suffices to support a determination of permanent neglect (Matter of Orlando F., 40 N.Y. 2d 103; Matter of Amos HH, 59 AD2d 795)". (Matter of Leon "RR", ___AD2d ___, 3rd Dept., January 25, 1979). The Commissioner has, quite wisely I believe, eschewed any temptation to predicate this case upon the theory that

there has evolved from Bennett v. Jeffreys, 40 N.Y. 2d 543 a non-statutory, nonfault basis for the permanent termination of parental rights. Even though this case is predicated upon and is decided on statutory grounds (Social Services Law 384-b and F.C.A. Art. 6), the non-statutory—no-fault concept as a basis for the permanent termination of parental rights has had such an appealing fascination for some courts that it deserves some discussion here, lest this insidious and pernicious doctrine of questionable constitutional validity find further lodgment in the law.

THE NON-STATUTORY, NO-FAULT CONCEPT.

Although Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543 did not "involve an attempted permanent termination of custody (Family Court §614, subd 1; §631; Matter of Anonymous (St. Christopher's Home), 40 N.Y. 2d 96; Matter of Orlando F., 40 N.Y. 2d 103; Matter of Ray A.M., 37 N.Y. 2d 619)" some courts have found in the "extraordinary circumstances" rule of *Bennett*, particularly where there has been a "protracted separation" of parent and child and "the psychological trauma of removal is grave enough to threaten destruction of the child," a new non-statutory, no-fault ground for termination of parental rights. Since the Court of Appeals in *Bennett* did not expressly create such a new ground for termination of parental rights and was indeed careful to state with care and specificity the circumstances under which intervention by the State in the right and responsibility of a natural parent to custody of a child would be warranted (p. 549), the source of this novel predicate for the exercise of the power of the State can only be traced to the command of the same court in Matter of Sanjivini K., 40 N.Y. 2d 1025, 1026, to resolve "the status of the child and the rights and obligations of the parties in that permanent neglect proceeding in conformity with the standards we have enunciated (Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543)."

Instead of limiting the command of the court to the dispositional phase of a proceeding for the permanent termination of parental rights (Family Court Act, Art. 6) where by

statute "the best interests of the child" is the focus and thrust of the proceeding (Family Court Act §§623, 614, subd. 1 (6)), the courts have found in *Bennett* a new non-statutory, no-fault ground for terminating parental rights (See Matter of Sanjivini K., 63 AD 2d 1021). This newly invented concept of "de facto permanent neglect" did not, however, go completely unchallenged, but was in fact severely criticized by the two dissenting justices as a concept for which there was no statutory authority or decisional precedent—one not sanctioned by anything in Bennett v. Jeffreys (See dissent pp. 1021–1031).[4]

A number of other appellate courts have by their holdings likewise seemingly sanctioned the creation of this new and independent non-statutory, no-fault ground for the termination of parental rights (See, Matter of Abbott House v. Barbara J., 55 AD2d 604; Matter of Leticia Rose M., 54 AD2d 909; Matter of Kim Marie J., 59 AD2d 716; Matter of Jean Yvette E., 59 AD2d 907; Matter of Jonathan D., Jewish Child Care Assn. v. Danielle F.D., 62 AD2d 947).[5]

It remained, however, for the judges of the Family Court to come forth with a clear and unequivocal articulation of the new concept of a non-statutory, no-fault ground for the termination of parental rights. The first to do so was Judge DONOVAN of Westchester County in Matter of Amy S., 89 Misc. 2d 42, 49–50, followed by Judge GARTENSTEIN of New York County in Matter of Suzanne Y., 92 Misc. 2d

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[4]Matter of Sanjivini K., 63 AD2d 1021 is on appeal to the Court of Appeals. The case should provide final clarification of the "best interests" test of Bennett v. Jeffreys to statutory termination proceedings.

[5]The Appellate Division affirmed an order dismissing a permanent neglect petition, but modified it by directing the court to hold a dispositional hearing on the issue of the best interest of the child. Pursuant to that direction the Family Court held a hearing and continued foster care. However, the Family Court, recognizing the unsatisfactory state of the case law in this area urged the Court of Appeals to rule on the applicability of *Bennett*, 40 N.Y. 2d 543 to cases involving Agencies and the termination of parental rights (Matter of Jonathan D., Fam. Ct., New York Co., N.Y.L.J. Feb. 9, 1979, p. 6, c. 3).

652, 658–661,[6] Judge MILLER of Rockland County in Matter of Strausberg, 92 Misc. 2d 620, 624 and Judge FOLLETT of St. Lawrence County in Matter of Andress, 93 Misc. 399, 402–403.

Most recently, the Appellate Division (3rd Dept) in Matter of Leon "RR", __AD2d __, has found in Matter of Bennett v. Jeffreys, 40 N.Y. 543 and Matter of Sanjivini K., 40 N.Y. 2d 1025 "a common law standard for termination of parental rights independent of the statutes", citing Matter of Kim Marie J., 59 AD2d 716, and Matter of Suzanne Y., 92 Misc. 2d 652.

All of this, as Judge DONOVAN in Matter of Amy S., supra points out (p. 50), is to embark upon a "path fraught with danger", for the concept opens the lid of a "Pandora's Box" (p. 45). Likewise, Judge GARTENSTEIN in Matter of Suzanne Y., supra 662 was equally uncomfortable with the unpredictability and the potential for abuse and tyranny such a concept provides for social agencies and courts to exercise for the good of its victims.

Moreover, the concept of a non-statutory, no-fault ground for the termination of parental rights, because a court determines that "the best interests" of the child requires it, is fraught with a serious constitutional question.

"In a long line of cases dating back more than 50 years, the Supreme Court has endowed the family with an aura of constitutional protection. In Meyer v. Nebraska, 262 US 390 (1923), the court invalidated a state law which prohibited the teaching of German. It held that the State's 'concern' for children and their best interest—in this case, the protection of children from foreign influences—was insufficient to overcome parents' rights to control their children's upbringing. In the more recent past in Stanley v. Illinois, 405 U.S. 645 (1972), the court invalidated an Illinois statute which automatically deprived non-marital fathers of their

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[6] Matter of Suzanne Y., 92 Misc. 2d 652 has been reversed by the Appellate Division, First Department, AD2d. The Court unanimously rejected Judge Garenstein's "no fault" theory of termination of parental rights.

children's custody upon the death of their mother. In describing the rights of parents as compared to non-related third parties, the court stated:

> "(We have) frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man' and 'rights far more precious than property rights'. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

"And most recently, in Smith v. Organization of Foster Families, 53 L. Ed. 2d 14 (1977), a case involving the three sided dispute between the state, natural parents and foster parents (see Children's Rights Report, Vol. 1, Nos. 4 & 6), a unanimous Supreme Court held that the right of natural parents to the custody of their children is a 'constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right.'

"Relying on these and other cases, the Supreme Court has underscored a right which is nowhere clearly mentioned in the constitution but has recently come to be known as the 'right of family integrity'." (Quoted from Children's Rights Report, Vol. III, No. 2, October 2, 1978, p. 2).

In Smith v. Organization of Foster Parents, 431 U.S. 816, 53 L. Ed. 2d 14; 97 S. Ct. 2097 Justice POTTER STEWART in his separate opinion emphasized that the constitution forbids the state from depriving fit parents of their children because it believes it to be in the child's "best interests", or because the child will be happier with someone else. In his opinion in which the Chief Justice and Mr. Justice REHNQUIST concurred he wrote: "One of the liberties protected by the Due Process Clause, the court has held, is the freedom to 'establish a home and bring up

children' Meyer v. Nebraska, supra, at 399, 67 L. Ed. 1042, 43 S. Ct. 625, 29 ALR 1146. If a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest, I should have little doubt that the State would have intruded impermissibly on the 'private realm of family life which the state cannot enter' Prince vs. Massachusetts, 321 US 158, 166, 88 L. Ed. 645, 64 S. Ct. 438" (Smith v. Organization of Foster Parents, supra, 53 L. Ed. 14, 46–7).

More recently, the United States Supreme Court clearly raised the warning flag when in Quilloin v. Walcott, ___U.S. 54 L. Ed. 2d 511–519–420, 98 S. Ct. 549, 554–555 it said: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. (citations.) 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder'. (citation.) And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment'. (citation.)

"We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'." (citing Smith v. Organization of Foster Families for Equality and Reform, 431 US 816, ___, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart J., concurring).

Likewise, the court of appeals in Bennett v. Jeffreys, 40 N.Y. 543, 548, which is the fountain-head for the development of the no-fault basis for the termination of parental rights and again in Matter of Goldman, 41 N.Y. 2d 894 recognized that in the exercise of the state's power there are constitutional limits to be observed. (See also, Janet G. v.

N.Y. Foundling Hosp. 94 Misc. 2d 133, 141–142). More recently, in Matter of Corey L. v. Martin L., 45 N.Y. 2d 383 the Court of Appeals speaking with respect to the termination of parental rights through adoption said (p. 386): "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on one who would terminate the rights of a natural parent through adoption". The constitutional barrier to the termination of a parent's rights is again emphasized by the court when at p. 389 it says: "Nevertheless, while accepting the change wrought by statutory law, this court has and must continue to respect constitutional limitations on the procedures for termination or deprivation of parental rights (see Matter of Goldman, 41 N.Y. 2d 894, 895, supra; Matter of Bennett v. Jeffreys, 40 N.Y. 2d 543, 548)". And again at p. 392 the court says: "* * *, the statute should not be so broadly applied that it establishes a preference. A termination of parental rights is a drastic event indeed so much so that it raises questions of constitutional dimension" (citing Matter of Goldman and Bennett v. Jeffreys, supra).

Although Matter of Corey L. v. Martin L., supra dealt with the termination of a parent's right by reason of abandonment in the context of an adoption proceeding there is language in the court's opinion which can fairly be said to create some doubt as to whether or not the Appellate Divisions and the Family Courts have not gone too far in finding in Bennett a non-statutory, no fault ground for termination of parental rights all in obeisance to the rubric of the "best interests" of the child. For instance, at p. 389 the court says: ". . . . the ultimate question is whether the submitted proof establishes abandonment as a matter of law", citing Matter of Bistany, 239 N.Y. 19, 24 and Matter of Maxwell, 4 N.Y. 2d 429, 433. Cannot one with equal logic substitute "permanent neglect" for "abandonment"? And again at p. 391 the court says: "Absent consent, the first focus there was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. * * * * The best interests of the child, as such, is not an ingredient of that conduct (the par-

ents) and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment". Again the question arises, cannot the words "permanent neglect" be substituted for "abandonment"? And finally, the court says (pp. 391–392): "If, for purposes of determining mere custody, the best interests of the child would not permit a parent to be displaced in the absence of extraordinary circumstances, surely a complete termination of obligations and rights is not to be allowed in a situation where, as here, abandonment has not been established, even if an ensuing adoption might be viewed by some to be in the best interests of the child."

The Court of Appeals decision in Corey L. v. Martin L., supra has caused some Family Court Judges to have some second thoughts as to whether the implications thought to have flowed from Bennett have not been too broadly applied (See decision of Judge GARTENSTEIN who "crystalized" the no-fault concept in Matter of Suzanne Y., 92 Misc. 2d 652 in the Second Matter of Suzanne Y., 95 Misc. 2d 733; Matter of Elizabeth Green, Family Ct., Bronx Co., N.Y.L.J. Dec. 12, 1978, p. 12, c. 6; and In re Jonathan D., Family Ct. New York County, N.Y.L.J. Feb. 9, 1979, p. 6, col. 3). Obviously, the last word on the concept of a non-statutory, no fault ground for the permanent termination of parental rights has not yet been written and won't be until the Court of Appeals has occasion to clarify and resolve the issue.[7]

It is not necessary for this court to attempt to resolve the constitutional issue posed by the concept of no-fault termination of parental rights based upon a comparative best interest standard, for the case can be decided on statutory grounds (Social Services Law §384–b and Family Court Act, Art. 6). "Constitutional questions should not be

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[7]The Court of Appeals may soon have the opportunity to do so, since the decision of the Appellate Division (2nd Dept) in Matter of Sanjivini K., 63 AD2d 1021 is now on appeal to the Court of Appeals.

reached unless their disposition is necessary" (Comiskey v. Arlen, 55 A D 2d 304, 306, affd. 43 N.Y. 2d 696). It is enough to point out the constitutional infirmity in such a concept, leaving its final resolution to an appellate court.

CONSTITUTIONALITY OF QUANTUM OF PROOF.

The respondent has raised a question as to the constitutionality of section 622 of the Family Court Act which permits the court to determine whether the allegations of permanent neglect (paragraphs (a), (b), (c) and (d) of subdivision one of section 614) are supported by a fair preponderance of the evidence. It is contended that to be constitutional the standard of proof must be "beyond a reasonable doubt" or at least "clear and convincing". The Attorney General has been notified that the constitutionality of the statute will be brought into question (Executive Law §71, CPLR §1012 (b), in this court, but he has chosen not to appear.

In response to the constitutional issue the court notes that sections 611 and 614 have been found to prescribe a constitutional standard of poof by the Appellate Division (3rd Dept.) In re Anthony L. "CC", 48 AD2d 415 and by a Family Court in Matter of Orzo, 84 Misc. 2d 482, 490–493.

Moreover, a finding of unconstitutionality should not be lightly undertaken by courts of first instance. "A statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such decision is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the Act is apparent on its face". (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150, and authorities there cited. See, e.g. Comiskey v. Arlen, 55 A D 2d 304, affd. 43 N.Y. 2d 696; Bolling v. Corsi, 204 Misc. 778, 783, affd. 306 N.Y. 315). The tendency is to leave such questions to appellate tribunals (City of New Rochelle v. Echo Bay WaterFront Corp., 182 Misc. 176, 177, affd. 268 A D 2d 182, affd. 294 N.Y. 678). Even intermediate Appellate Courts sometimes defer to higher appel-

late courts (Matter of Excelsior Pictures Corp. v. Regents, 2 A D 2d 941). "There is a strong presumption that a statute duly enacted by the Legislature is constitutional" (People v. Pagnotta, 25 N.Y. 2d 333, 337).

Consequently, the issue of the constitutionality of the statute (F.C.A. § 622) will not be passed upon and the decision here made is predicated upon the standard of proof prescribed by the statute—"a fair preponderance of the evidence".

THE AGENCY'S DILIGENT EFFORTS.

The only real plan for the future of the Santosky children that has ever been formulated by anyone is the plan evolved by the Commissioner of Social Services pursuant to this Court's order of December 31, 1975 (See Matter of Santosky, supra 732).

To implement this plan through "diligent efforts"[8] to encourage and strengthen the parental relationship, the Agency in accordance with court's directive, redoubled its efforts to raise these parents to an acceptable minimal level

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[8]Section 384-b, subd 7 (f) defines this phase as follows:

"(f) As used in this subdivision, 'diligent efforts' shall mean reasonable attempts by an authorized agency to encourage a meaningful relationship between the parent and the child, including but not limited to:

(1) Consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family.

(2) Making suitable arrangements for the parents to visit the child.

(3) Provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated.

(4) Informing the parents at appropriate intervals of the child's progress, development and health."

For an elaboration of the need for the Agency to make "diligent efforts" and the consequences of its failure to do so, see Matter of Anita PP, 65 AD2d 18.

of competency as parents (See Matter of Santosky, supra 741).

The Commissioner in his petition alleges and the proof supplied through the testimony of the two case workers in charge of the Santosky case supports a finding that following this court's decision in January 1977 and for the past two years at varying times the Agency has offered and arranged for and encouraged the respondents to accept:

(a) Visits with the children on an average of twice a month, the children being brought to their home.

(b) Attendance by Respondent, Annie Santosky at the Child Enrichment Program offered by the Family Service Center to mothers with pre-school children, which program included the use of a parent aid. Transportation was provided.

(c) Psychological evaluations of both respondents, and a complete neurological evaluation of the Respondent, John Santosky, at St. Francis Clinic, Poughkeepsie. Transportation was also provided.

(d) Follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.

(e) Counseling sessions for Respondents with certified social worker, Elizabeth Smith of Family Service Center.

(f) Birth control counseling at Planned Parenthood.

(g) Vocational training to the Respondent, John Santosky through the Office of Vocational Rehabilitation and Gateway Industries.

(h) Education assistance to tth Respondent, John Santosky at the Adult Learning Center.

(i) Nutrition Aid Services to Respondent, Annie Santosky since November 1977.

(j) Homemaker Serrvice to help the Respondents immediately prior to and after the birth of their fourth child in June 1978.

(k) Public Assistance, Food Stamps and Medicaid to the Respondent. The total value of all Social Services offered to the Respondents since November 1976 exceeds $16,000.

"In short," as the court stated in its opinion in Matter of Santosky, supra, 733; "ever since the Santosky children have been in foster home placement, the parents have not only had offered, but diligently urged upon them every social service available in Ulster County which could conceivably have helped the Santoskys in achieving a goal of the eventual reunion of the family".

I am satisfied, therefore, as I was in the earlier case, that the preponderance of the evidence supports a finding that the Ulster County Department of Social Services has indeed made diligent efforts to encourage and strengthen the parental relationship. The observation that it has done so, "albeit with minimal success" cannot, however, be truly said of the Agency's renewed and redoubled efforts. To credit the Agency's efforts with any success this time around is to take a more charitable view of the matter than the evidence warrants, for both case workers who have been so long intimately involved with providing social services to this family testified that in spite of all their efforts they could discern no forward progress whatever; that their progress in parenting ability and skills was nonexistent. At the end, the Santoskys' capacity to function as parents for their children remained as minimal as at the start. Regretfully, the Agency acknowledges that its diligent efforts through the offering of a variety of social services, which met with a response ranging from grudging acceptance to outright hostility has been a failure. Nevertheless, in spite of ample cause for discouragement and ultimate failure the court is satisfied that the requirement of paragraph (c) of subdivision one of Section 614 of the Family Court Act has been amply met by a preponderance of the evidence.

Since the children who are but 7, 5 and 4 years of age are all obviously under 18 years of age and are presently by virtue of orders of this court in the care of the Ulster County Department of Social Services, an authorized Agency, the court finds that the requirements of paragraphs (a) and (b) of subdivision one of Section 614 of the Family Court Act are supported by a preponderance of the evidence. As

in the first trial of this case the critical issue and the one on which the parents right to the continued possession of their children stands or falls, is their alleged failure to plan for the future.

THE PARENTS' FINANCIAL ABILITY TO PLAN.

To sustain an adjudication of permanent termination of parental rights there must be a finding that the parents "failed for a period of more than one year * * * substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so", (F.C.A. §§ 611, 614, subd. 1 (d)).

Because the phrase, although . . . "financially able to do so" could not under well recognized rules for the construction of statutes be rejected as superfluous but had to be given meaning and effect (McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 231), the court in its earlier decision in this case found that because they were the recipients of full public assistance, including food stamps and medicare, that the Santoskys' financial ability was nonexistent. In short, the court found that by reason of their poverty, their failure to plan for the future had to be excused (See Matter of Santosky, 89 Misc. 2d 730). Although the dismissal of the proceeding was affirmed on appeal, this conclusion of the trial court was rejected by the Appellate Division (3rd Dept) which in its decision of affirmance under the name of Matter of John W. and others, 63 AD2d 750 said: "The Court determined, however, that respondents' failure to plan for the future of the children had to be excused by their poverty. It is the opinion of this court that, absent evidence that a parent is receiving an inadequate amount of public assistance, the fact that the parent is receiving public assistance does not automatically excuse that parent from substantially planning for the future of a child. There was no proof in the present case that respondents were receiving inadequate public assistance."

This view of the adequacy of public assistance to provide sufficient financial ability to plan for the future seems to be shared by the Appellate Divisions of both the 1st and 4th

Departments. In Matter of Klug, 32 AD2d 915 the 1st Dept. observed: "So far as financial ability to care for a child is concerned, the court is well aware of the fact that in this city a mother may obtain support to maintain herself and her child." And in Matter of Karas v. Karas, 59 AD2d 1022 the 4th Dept. said: "Respondent contends on appeal that the proof fails to establish by a preponderance of the evidence that she was financially and physically able either to maintain contact with or plan for the future of her children. The assertion of financial ability clearly lacks merit. Although respondent was a recipient of public assistance, she could have made arrangements to visit and communicate with her children."

To rebut any contention that the public assistance furnished to the Santoskys might be inadequate, although no such contention was in fact made, the Commissioner offered proof that from December 1, 1976 to September 30, 1978 the County of Ulster furnished to the Santoskys financial assistance totaling $15,338.72 in the following categories and amounts:

Public Assistance	$ 9,120.000
Medicaid	2,633.72
Nutrition Aide	150.00
Counseling Service	300.00
Child Welfare Caseworker Counseling	3,155.00
TOTAL	$15,338.72

In light of the Appellate Division's decision in this case, Matter of John W. and others, 63 AD2d 750, and the Appellate decisions to which reference has been made the court is constrained to hold that the Santoskys' total dependence on public assistance throughout the history of this litigation furnishes no excuse for their failure to plan for the future of their children so long in foster care.

FAILURE TO PLAN.

This court in its earlier decision in this case (Matter of Santosky, 89 Misc. 2d 730, affd. 63 AD2d 750) reviewed at some length (pp 734–5) the decisional definitions of the

phrase "substantially to plan for the future of the child." Much of what was there said has now been codified by the enactment of Section 384-b of the Social Services Law (L. 1976, c. 666, effective January 1, 1977) where in subd. 7 (c) "to plan for the future of the child" is defined.

Social Services Law § 384-b, subd. 7 (c) now provides:

> "(c) As used in paragraph (2) of this subdivision, 'to plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent".

In contrast to the situation prevailing at the time of the first trial (November 1976) when this court was able to find that "while the Santoskys' plans for the future of their children (were) indeed nebulous and (had) never been articulated, they (had nevertheless) 'acted to accomplish' the agency's plans"[9] these parents' failure since 1976 to "utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources" has been almost total and complete. Except for superficial cooperation with a nutritional aide and a public health nurse, the Santoskys have failed in any meaningful way to take advantage of the many social and rehabilitative services that have not only been made available to them but have been diligently urged upon them. Even Elizabeth Smith, Director of the Family Service Center of the Children's Home of Kingston, the witness who was previously most favorable

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[9]This finding was found by the Appellate Division to be sufficiently supported by the record. "Considering the record as a whole, we are of the opinion that the respondents have substantially planned for the future of their children" (Matter of John W. and others, 63 AD2d 750).

to their cause, has been reluctantly forced to conclude because of their passivity and reluctance to participate in activities designed to help them,[10] particularly the Children's Enrichment Program, a program specifically designed to deal with the problems of parent-child relationships, that the return of any of the children to the Santoskys' in any foreseeable future should not be considered.

At no time can it be fairly said that these parents have ever "tak(en) such steps as may be necessary to provide an adequate, stable home and parental care for the child(ren) within a period of time which is reasonable under the financial circumstances available to (them)," (Social Services Law § 384-b subd. 7 (c)). Two of these children have been in foster care for more than four years and the third more than five. For all of this time the Santoskys have been the recipients of Social Services[11] and there is nothing in the situation which holds out any hope that they may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time it must be said, "enough is enough".

---

[10]The four factors which to the witness provided contradiction to the return of the children to the Santosky home within the foreseeable future were:

> "1. The Santoskys' passivity in seeking and participating in activities intended to be helpful to them (In the main, I see them only if I am able to go to their home as they have made numerous excuses as to why they could not keep appointments at my office);
>
> 2. The Santoskys' restrictive parenting practices which inhibit normal development in their child;
>
> 3. The Santoskys' fears which preclude participation in activities outside their own family group.
>
> 4. The recent birth of a fifth child which adds to the demands made upon both Mr. and Mrs. Santosky."

[11]Since 1976 a total of $9,120 has been provided in public assistance and a total of $6,118.72 in other social and rehabilitative services.

Except for the plan[12] formulated by the Agency, and the Santoskys' superficial efforts to comply therewith, which have tapered off to the point where they are no longer measureable, there has never been any "plan" formulated by the parents, probably because they are simply incapable of doing so. However, even giving them credit for their miniscule efforts to comply with the Agency's plan through taking advantage of the social services offered to them is no longer enough to save them from the loss of their children, for the statute states that, "good faith effort shall not of itself, be determinative". (Social Services Law § 384–b, subd. 7(c)).

In short, the time has arrived when the court must acknowledge, no matter how tragic the result may be for these parents, that the Santosky are not now capable, and at any time in the foreseeable future, are probably incapable, despite all efforts to assist them of planning for the future of their children as that term is defined by law (Social Services, Law, § 384–b, subd. 7 (c)), in any meaningful way. I therefore conclude that the record in this case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to "plan for the future of (their children) although physically and financially able to do so" (F.C.A. § 614, subd. 1 (d); Matter of Orlando F., 40 N.Y. 2d 103).

The testimony of the petitioner's witness, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center, and Exhibits No. 2–4 in evidence have not been considered in the determination of the Fact Finding phase of this proceeding (F.C.A. § 622, but will be considered in the Dispositional Hearing (F.C.A. § 623).

This matter will, therefore, be scheduled for a dispositional hearing "to determine what order of disposition shall be made in accordance with the best interests of these children" (F.C.A. § 623). The Clerk of the Court is directed to schedule such a dispositional hearing on notice to all interested parties.

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[12] See Matter of Santosky, 89 Misc. 2d 730.

In the meantime, and until such a hearing can be held, the Commissioner's application for an extension of placement is granted and the children are continued in the care of the Commissioner of Social Services (F.C.A. § 1055).

Dated: March 12, 1979.

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY

In the Matter of the Commitment of
Guardianship and Custody pursuant
to § 384-b of the Social Services Law
of TINA FRANCES APEL, JOHN SANTOSKY III,
and JED CONRAD SANTOSKY, cchldren under the age
of Eighteen years alleged to be Permanently
Neglected Children.

April 5, 1979

RICHARD W. CRIGGS, Attorney for
Commissioner of Social Services.

ALAN SUSSMAN (VICTORIA BLYTHE of Counsel),
Attorney for Respondent.

MARRIN & SMYTH (ROSEMARY SMYTH, of Counsel),
Attorneys for Foster Parents.

JAY SAMOFF, Law Guardian.

HUGH R. ELWYN, J: The Court has previously found that the allegations required by paragraphs (a), (b), (c) and (d) of section six hundred fourteen of the Family Court Act were supported by a fair preponderance of the evidence (F.C.A. 622).

After a dispositional hearing held on April 5, 1979 the Court now finds that the best interests of all three of the Santosky children require that their parents' custody be terminated permanently (F.C.A. § 623) and that their guardianship and custody be committed to the petitioner, the Commissioner of Social Services of Ulster County (F.C.A. § 631, subd (c). The petitioner's witnesses, Daniel Lucy and Lynn Davis, the social workers in charge of the Santosky case, and the petitioner's two expert witnesses, Dr. Lenore M. Sportsman, Director of the Albany Child Guidance Center and Elizabeth Smith, Director of the Fam-

ily Service Center of the Children's Home of Kingston were unanimous and firm in their opinion that the children's best interests required that the parents' right to their custody be permanently terminated and that a permanent and stable home environment be sought for each child through the medium of adoption. No evidence to the contrary has been presented on behalf of the respondents.

The court notes, however, that Dr. Lenore Sportsman expressed the opinion that the children John and Tina could be expected to continue to have psychological difficulties in adjusting to any home situation and that she therefore strongly recommended and, in fact, considered it essential that any set of adoptive parents should be receptive, amenable and cooperative with efforts to provide them with such professional counseling, whether in the form of psychiatric, psychological, or family counseling services as might be offered to them.

Accordingly, the Court directs the entry of order pursuant to section 687 of the Family Court Act committing the guardianship and custody of Tina Frances Apel, John Santosky II and Jed Conrad Santosky to the Commissioner of Social Services of Ulster County, but will attach to the order of commitment the condition that Commissioner provide supportive help to each child and their respective foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisers may be required to best promote the adjustment of child and foster parents, or adoptive parents, to a healthy and permanent relationship.

The Clerk will prepare and submit an appropriate order.

Dated: April 10, 1979.

FAMILY COURT—ULSTER COUNTRY

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

Docket No. B–3–78

PRESENT: Hon. HUGH R. ELWYN
Judge

In the Matter of
TINA FRANCES APEL

A Child under the Age of Eighteen Years,
Alleged to be a Permanently Neglected Child.

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Tina Frances Apel is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky the parent(s) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) having appeared thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a),(b),(c) and (d) of Section 614 of the Family Court are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) having appeared thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, is

ADJUDGED that Tina Frances Apel is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') custody of the child be terminated permanently, it is

*ORDERED that the custody of Tina Frances Apel the parent(s) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commissioner of Social Services the Petitioner herein upon the following terms and conditions: that the Commisioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

ENTER,

/s/ _____

HUGH R. ELWYN

*These provisions are eliminated if judgment is suspended.

FAMILY COURT—ULSTER COUNTY

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

Docket No. B–4–78

PRESENT: Hon. HUGH R. ELWYN
Judge

In the Matter of
JOHN SANTOSKY III

A Child under the Age of Eighteen Years,
Alleged to be a Permanently Neglected Child.

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that John Santosky III is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky the parent(s) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) having appeared hereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) having appeared hereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore it is

ADJUDGED that John Santosky III is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') custody of the child be terminated permanently, it is

*ORDERED that the custody of John Santosky III the parent(s) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commissioner of Social Services the Petitioner herein upon the following terms and conditions: that the Commissioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

ENTER,

/s/ _____

HUGH R. ELWYN

*These provisions are eliminated if judgment is suspended.

FAMILY COURT—ULSTER COUNTY

At a Term of the Family Court of the State of New York, held in and for the County of ULSTER at KINGSTON, New York on April 5, 1979

Docket No. B–5–78

PRESENT: Hon. HUGH R. ELWYN
Judge

In the Matter of
JED CONRAD SANTOSKY

A Child under the Age of Eighteen Years,
Alleged to be a Permanently Neglected Child.

ORDER OF DISPOSITION

A Petition under Article 6, Part 1 of the Family Court Act having been filed in this Court alleging that Jed Conrad Santosky is a permanently neglected child; and summons having been issued and duly served upon Johnnie and Annie Santosky the parent(s) of said child; and

The matter having duly come on for an adjudicatory hearing; and the said parent(s) having appeared thereon; and this Court, after hearing the proofs and the testimony offered in relation to the case, having found that the allegations of the petition herein required by paragraphs (a), (b), (c) and (d) of Section 614 of the Family Court Act are supported by a fair preponderance of the evidence; and

The matter having duly come on for a dispositional hearing; and the said parent(s) having appeared thereon; and this Court having made examination and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved in this proceeding; now, therefore, it is

ADJUDGED that Jed Conrad Santosky is a permanently neglected child as defined by Article 6, Part 1 of the Family Court Act; and

*IT APPEARING that the moral and temporal interests of the child require that the parent'(s') custody of the child be terminated permanently, it is

*ORDERED that the custody of Jed Conrad Santosky the parent(s) of said child, over said child be and the same hereby is terminated permanently; and it is further

*ORDERED that the custody of said child be and the same hereby is awarded to Ulster County Commisioner of Social Services the Petitioner herein upon the following terms and conditions: that the Commisioner provide supportive help to the child and foster parents in the form of such professional psychiatric, psychological and family counseling services, as in the judgment of his professional advisors may be required to best promote the adjustment of child and foster parents or adoptive parents to a healthy and permanent relationship.

ENTER,

/s/ _____

HUGH R. ELWYN

*These provisions are eliminated if judgment is suspended.

STATE OF NEW YORK
FAMILY COURT: ULSTER COUNTY

B–3–78
B–4–78
B–5–78

In the matter of

JOHN SANTOSKY III,
JED SANTOSKY
TINA FRANCES APEL,

Children Under the Age of Eighteen Years Alleged to be Permanently Neglected Children.

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that, pursuant to the provisions of section 5601 (b) of the Civil Practice Law and Rules, the above-named respondent relying solely upon the constitutional question involving the validity of Section 622 of the Family Court Act of New York, under the provisions of Section 6, Article 1, of the Constitution of the State of New York and of Amendment Fourteenth of the Constitution of the United State, hereby appeals as of right to the Court of Appeals of the State of New York, from the final judgment herein, dated the 5th day of April 1979, adjudging the subject children of this proceeding to be permanently neglected, by order of Hon. Hugh R. Elwyn, Justice of the Family Court on the 5th day of April, 1979, and entered in the office of the clerk of the Ulster County Family Court on the 5th day of April, 1979, and from each and every part of the said judgment and order and from the whole thereof.

Dated: April 24, 1979

RICKEN, GOLDMAN, SUSSMAN & BLYTHE
Attorneys for Respondents
14 Pearl Street
Kingston, New York 12401
Tel. No. (914) 339-3050

TO: RICHARD W. GRIGGS, ESQ.
Attorney for Petitioner
243 Fair Street
Kingston, New York 12401

FAMILY COURT—ULSTER COUNTY

At a Special Term of the Family Court of the State of New York, held in and for the County of Ulster at 240 Fair Street, Kingston, New York, on the 8th day of May, 1979

Docket Nos.
B-3-4-5-78

PRESENT: HON. HUGH R. ELWYN,
Justice.

In the Matter of the Commitment of Guardianship and Custody pursuant to Section 384-b of the Social Services Law of TINA FRANCES APEL, JOHN SANTOSKY III, and JED SANTOSKY, children under the age of Eighteen Years alleged to be Permanently Neglected Children.

ORDER

UPON the Order of this Court dated April 26, 1979, ordering petitioner to show cause why the Order of this Court dated April 5, 1979, finding the infant children of this proceeding to be permanently neglected children should not be stayed; and

UPON the affidavit of Alan N. Sussman, Esq., attorney for the respondents, dated April 24, 1979, in support of the stay and upon the answering affidavits of Jay Samoff, Esq., Law Guardian, dated May 3, 1979, and Wilfrid E. Marrin, Esq., attorney for the foster parents, dated May 3, 1979

and Richard W. Griggs, Esq., attorney for petitioner, dated May 10, 1979, all in opposition thereto; and

UPON hearing counsel for respondents, counsel for foster parents and the law guardian before me in open court on the 8th day of May, 1979, and due deliberation having been had, and a decision having been written on the 8th day of May, 1979, it is hereby

ORDERED, that all proceedings to enforce the order of this Court dated April 5, 1979, including the authority of petitioner to consent to an adoption of the children herein, are hereby stayed; and it is further

ORDERED, that the stay granted herein is conditioned upon respondents perfecting their appeal to the Court of Appeals, within 60 days of filing the Notice of Appeal; and it is further

ORDERED, that questions or issues of visitation of the within children with respondents shall reside within the discretion of the petitioner, in whose custody the children remain.

/s/ _____

HUGH R. ELWYN
J.F.C.

Entered: Kingston, New York
May 18, 1979

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of June A.D. 1979

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 614 SSD 51

In the Matter of JOHN S. (Anonymous) III, JED S. (Anonymous) and TINA FRANCES A. (Anonymous), Children Under the Age of Eighteen Years Alleged to be Permanently Neglected Children.

John and Ann S. (Anonymous), Appellants.

The appellants having filed a notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is transferred by the Court *sua sponte* to the Appellate Division, Third Department, without costs, upon the ground that a direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved (N.Y. Const., Art. VI, § 3[b] [2], § 5[b]; CPLR 5601[b] [2]).

/s/ _____
DONALD M. SHERAW
Deputy Clerk of the Court

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

May 1, 1980 36228

In the Matter of JOHN "AA"* et al., Children Alleged to be Permanently Neglected.

BERNHARDT S. KRAMER, as Commissioner, Ulster County Department of Social Services, RESPONDENT,

v.

JOHN "AA"* ET AL., APPELLANTS.

Appeal from a judgment of the Family Court of Ulster County (Elwyn, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act.

The sole contention upon this appeal is that section 622 of the Family Court Act is unconstitutional because the standard of proof required by the statute, a fair preponderance of the evidence, is so low that it deprives them of due process of law. In *Matter of Anthony L. "CC"* (48 A D 2d 415, 419), this court held that the level of proof required by section 622 was constitutional. In adhering to our decision, we note that the permanent neglect statute (Social Services Law, § 384-b; Family Ct. Act. § 611, *et seq.*) recognizes and seeks to balance rights possessed by the child (see Social Services Law, § 384-b, subd. 1; *Matter of Bennett* v. *Jeffreys*, 40 N Y 2d 543, 547) with those of the natural parents (see Social Services Law, § 384-b, subd. 1; *Matter of Sanjivini K.*, 47 N Y 2d 374, 382; *Matter of Corey L* v. *Martin L*, 45 N Y 2d 383, 392). Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.

Judgment affirmed, without costs.

MAHONEY, P. J., GREENBLOTT, KANE, MAIN and MIKOLL, JJ., concur.

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*Fictitious name.

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

AT a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 17th day of March, 1980.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

In the Matter of TINA FRANCES APEL, JOHN SANTOSKY III and JED CONRAD SANTOSKY, children under the age of eighteen years alleged to be Permanently Neglected Children.

BERNHARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
PETITIONER-RESPONDENT.

JOHN SANTOSKY II and ANNIE SANTOSKY,
RESPONDENTS-APPELLANTS.

ORDER
36228

The appellants having appealed from a judgment of the Family Court of Ulster County (ELWYN, J.), entered April 5, 1979, which adjudged appellants' three children to be permanently neglected pursuant to article 6 of the Family Court Act, and said matter having been presented during the above-stated Term of this Court, and after due deliberation the Court having rendered a decision on May 1, 1980, it is hereby

ORDERED that the judgment appealed from be affirmed, without costs.

ENTER:

/s/
JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: May 7, 1980

A TRUE COPY

/s/
JOHN J. O'BRIEN
Clerk

FAMILY COURT—ULSTER COUNTY
STATE OF NEW YORK

In the Matter of John "AA" et al., Children Alleged to be Permanently Neglected,

JOHN "AA" ET AL.,
RESPONDENTS-APPELLANTS,

-against-

BERNHARDT S. KRAMER, as Commissioner,
Ulster County Department of Social Services,
PETITIONER-RESPONDENT.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the Respondents-Appellants, relying solely upon the question directly involving the provisions of the Fourteenth Amendment of the Constitution of the United States and the constitutionality of New York Family Court Act, Section 622, appeal as of right to the Court of Appeals of the State of New York from a final Order of the Appellate Division, Third Department, entered in the Office of the Clerk of the Appellate Division, on May 7, 1980 and served upon Respondent May 9, 1980, which unanimously affirmed the judgment of the Family Court of Ulster County, in favor of the Petitioner-Respondent, entered in the Office of the Clerk of the County of Ulster on April 5, 1979 and Respondents-Appellants appeal from each and every part of the Order of the Appellate Division and from the whole thereof.

Dated: May 20, 1980.

Yours, etc.,

RICKEN, GOLDMAN, SUSSMAN & BLYTHE
Attorneys for Appellants
185 Fair Street
Kingston, New York 12401

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September A.D. 1980

Present, HON LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 797

In the Matter of TINA FRANCES APEL, JOHN SANTOSKY III and JED CONRAD SANTOSKY, children &c. Alleged to be Permanently Neglected Children.

BERNHARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
RESPONDENT,

JOHN SANTOSKY II and ANNIE SANTOSKY,
APPELLANTS.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/s/ _____
JOSEPH W. BELLACOSA
Clerk of the Court

SUPREME COURT OF THE UNITED STATES

No. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY, PETITIONERS

v.

BERNARDT S. KRAMER, COMMISSIONER, Ulster County Department of Social Services

ON PETITION FOR WRIT OF CERTIORARI TO THE Appellate Division, Supreme Court of New York, Third Judicial Department.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 23, 1981

[K-165]

No. 80-5889

Supreme Court, U. S.
FILED
JAN 7 1981
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK SUBMITTED PURSUANT TO RULE 36(4) OF THE RULES OF THIS COURT IN OPPOSITION TO GRANTING CERTIORARI

ROBERT ABRAMS
Attorney General of the
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The Capitol
Albany, New York 12224
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SHIRLEY ADELSON SIEGEL
Solicitor General

LAWRENCE J. LOGAN
Assistant Attorney General
of Counsel

Question Presented

Does the standard of proof by a fair preponderance of the evidence under section 622 of the New York State Family Court Act, which requires that in a proceeding for the commitment of the guardianship and custody of a child on the ground of permanent neglect it be established that the child is under 18 years of age; in the care of an authorized agency; that the authorized agency has made diligent efforts to encourage and strengthen the parental relationship; and that the parent or guardian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of the authorized agency, substantially and continuously or repeatedly failed to maintain contact with or plan for the future of the child, although physically and financially able to do so, violate the due process clause of the United States Constitution?

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In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK SUBMITTED PURSUANT TO RULE 36(4) OF THE RULES OF THIS COURT IN OPPOSITION TO GRANTING CERTIORARI

Statement

Petitioners assert in their petition for a writ of certiorari that section 622 of the Family Court Act of the State of New York is unconstitutional and denies them due process under the United States Constitution, Fourteenth Amendment. The Attorney General of the State of New York, pursuant to New York State Executive Law, §71, submitted a brief to the Supreme Court,

Appellate Division, Third Department, in support of the constitutionality of section 622 of the New York State Family Court Act. The Attorney General submits this *amicus curiae* brief in opposition to the petitioners' application for certiorari upon the grounds that section 622 of the New York State Family Court Act is constitutional and that the petition presents questions which are not substantial constitutional questions.

Opinions Below

The opinions below are attached to the petition for a writ of certiorari.

The Supreme Court, Appellate Division, Third Department, held that the New York State Family Court Act recognizes and seeks to balance rights possessed by the child with those of the natural parents and, accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional.

The Court of Appeals of the State of New York granted a motion to dismiss the appeal taken by petitioners to that Court upon the ground that no substantial constitutional question was directly involved.

Facts

The petitioners' child Tina, who is now nine years of age, has been in a foster home for the past seven years; the petitioners' child John, who is now seven years of age, has been in a foster home for the past six years; the petitioners' child Jed, who is now six years of age, has been in a foster home for the past six years. The statement of the case contained in the petition adequately sets forth the facts in this proceeding.

State Statutes Involved

The relevant State Statutes involved are attached hereto as Appendix A.

Reasons For Denying the Writ

In the case of *Doe v Delaware* (Docket No. 79-5932), presently pending before this Court, the standard of proof is based on Delaware decisional law. In the instant case the standard of proof has been promulgated by the Legislature of the State of New York. New York State Family Court Act §622 was enacted in 1959 based on legislative findings wherein the Legislature found that it is desirable for a child to grow up with a normal family life in a permanent home and that it is generally desirable for a child to remain with or be returned to the natural parent. That when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child. It was further found that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents and that such unnecessary stays deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The intent of the New York State Legislature is stated as follows (New York State Social Services Law §384-b):

"1. • • •

(b) • • •

"It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption."

The statute attempts to balance a child's right against the parent's right. When the relevant statutes were amended in 1959 (New York Session Laws 1959, chs 448, 449, 450) and defined the term "permanently neglected child", it was

recognized that two rights were involved — the child's and the parent's.

> "Senate Bill, Introductory Number 3437, and Assembly Bill, Introductory Number 1751, amend the Children's Court Act and the Domestic Relations Court Act, respectively, to define the term 'permanently neglected child' and to provide procedures by which a child may be judicially determined to be permanently neglected. These procedures recognize a parent's rights with respect to his child, but at the same time recognize a *child's right* to have every opportunity for normal family affection and care." (Emphasis supplied.) (Governor's Memorandum of Approval, 1959 McKinney's Session Laws, p 1750.)

> "Permanent termination statutes focus by necessity on the care the parent gives to the child. Unless the parent is found unfit, his rights in the child cannot be terminated. At the same time the statutes will not be given their proper application until the *rights* and interests *of the child* also receive due recognition. Alongside the rights of parents in children should be recognized the *rights of children* in parents — parents who will take them into a warm and supportive permanent home." Gordon, Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute, 46 St. John's Law Review, 215, 263 (1971). (Emphasis supplied.)

The Family Courts of the State of New York in applying the statute have done so with recognition that while the rights of parents must be jealously guarded, the purpose of the statute was to provide a solution to the problem where a parent has failed to act as a parent but has nevertheless refused consent to adoption. In *Matter of Klug*, 32 AD2d 915, the Supreme Court, Appellate Division, First Department, in its decision, stated in part as follows (916):

> "* * * With knowledge that the purpose of the statute was to enlarge a definition of neglect so as to provide a solution for the many thousands of children placed in

> institutions and forgotten by their parents, * * *. * * * While the rights of parents must be jealously guarded, it should not be forgotten that the purpose of the present statute was to provide a solution to the problem where a parent has failed to act as a parent but has nevertheless refused her consent to adoption. The emphasis of the statute was not on the rights of natural parents, but on the plight of thousands of forsaken children whose parents had abandoned their responsibilities of care and support. A parent who has failed in her obligation to maintain, care for, protect and plan for the future well-being of her child, has forfeited her parental rights. The welfare of the child is still the primary and paramount concern of the court. * * *"

In *Matter of Jones*, 59 Misc 2d 69, the Family Court of New York County, in its decision, stated in part as follows (74):

> "* * * When the biological parents fail to accept the parental role, the State in these proceedings must attempt to insure for the child what should be his birthright: a responsible and affectionate parental relationship — 'a happy home and the love and affection to which all children are entitled.' (See *Matter of Knapp*, 3 Misc 2d 840, 843 [Surrogate's Ct, Kings County, 1956].)"

The statute (Family Court Act, §622) seeks a balance between a child's right and a parent's right. It is submitted that the rights are equal. The scales of justice should not be tipped one way or the other. In cases such as this which involve conflicting rights of parents and of children, neither should be forced to share a greater degree of proof than the other. The adoption by the Legislature of the "preponderance of the evidence" rule assures that the scales are not tipped in favor of either party.

Other states have upheld the preponderance rule in proceedings to terminate parents' rights. In *Matter of N.J.W.*, 273 NW2d 134 (So Dak, 1978), the Court stated in part at pages 139-140 as follows:

"Appellants next contend that the standard of proof in dependency and neglect cases, a preponderance of the evidence, is unconstitutional and that the court erred in applying that standard. Appellants argue that where fundamental rights are concerned, a higher standard of proof is required, i.e., beyond a reasonable doubt. We strongly disagree. Dependency and neglect cases involve the often-conflicting rights of parents and of children. It becomes necessary, in determining the proper standard of proof, to weigh the interests of both parent and child. We fully agree with the reasoning of the Arizona Court of Appeals in *Hernandez v. State ex rel. Arizona Dept. of Econ. Sec.*, 23 Ariz. App. 32, 530 P.2d 389 (1975), where the Court stated:

'In a termination proceeding an error in factual determination can result in the termination of the parental relationship when such termination is not justified. On the other hand it can result in the failure to terminate when the relationship should be ended. The standard of proof is going to affect the relative frequency of those two erroneous outcomes. [A higher standard of proof] would result in a greater risk than (sic) parental rights would be erroneously severed, but a smaller risk than (sic) a child, as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes. Comparing the social disutility of these two erroneous outcomes, we do not believe that one can make a *fundamental* value determination that the erroneous severance of parental rights, vis-a-vis the erroneous failure to sever, constitutionally requires a higher burden of proof. (530 P.2d at 393)

This is not a situation, as in a criminal case, where the conflict is between an individual and the state. In such a case, the rights of the individual are paramount to those of the state and an extremely high standard of proof, i.e. beyond a reasonable doubt, is indeed proper and required. However, in the case before us, the conflict is essentially between the rights of the parents and those of the children. In this situation, the application of a balancing

test is eminently logical and necessarily fair. Therefore, the preponderance of the evidence standard is proper and constitutional.' "

That the State as *parens patriae* may act to guard the interest of children has long been established. This Court in *Ginsberg v State of New York*, 390 US 629, held at pages 639 and 640 as follows:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in §484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find the minors' exposure to such material might be harmful. * * *
>
> "The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d, at 75, 271 N.Y.S.2d, at 951, 218 N.E.2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, which had struck down the first version of §484-h on grounds of vagueness. In his concurring opinion, 15 N.Y.2d, at 312, 258 N.Y.S.2d, at 392, 206 N.E.2d, at 334, he said:
>
> > 'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'
>
> In Prince v. Commonwealth of Massachusetts, supra, 321 U.S., at 165, 64 S.Ct., at 441, this Court, too, recognized

> that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free citizens.' "

The cases cited by the petitioners in support of their constitutional argument are not relevant to the issue herein. *In Re Winship*, 397 US 358 (1970) involved the loss of liberty. This Court held that loss of liberty by a juvenile delinquent fell in the same category as loss of liberty by an adult and hence the "beyond a reasonable doubt" rule applied. The petitioners herein face no loss of their liberty.

In *Addington v Texas*, 441 US 418, 99 S Ct 1804 (1979), another loss of liberty case (involving commitment to a State mental hospital), this Court held as follows (431):

> "Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the State."

The *Woodby v INS*, 395 US 276 (1965), and *Chaunt v United States*, 364 US 350 (1960), cases referred to by this Court in the *Addington* decision, wherein it had previously applied the "clear, unequivocal and convincing" standard of proof to protect interests in civil cases, are inapposite for two reasons: All are cases involving the State and individuals, with loss of liberty at stake; and all involve proceedings solely within the jurisdiction of Federal courts (naturalization and deportation). The Federal courts for this latter reason are free to adopt their own rules on burden of proof. However, when State laws and matters of State concern are involved, other principles apply.

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we

> should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)." *Patterson v. New York*, 432 U.S. 197, 201, 202 (1977).*

The petitioners' contention that the burden of proof in a parent-child custody proceeding should be "clear and convincing evidence" is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In a most recent case, this Court has upheld the power of Congress to utilize the "preponderance" rule in loss of citizenship cases. In *Vance v Terrazas*, 444 US 252 (1980), the Court held (pp 264, 266) as follows:

(264) "With respect to the principal issues before it, the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be by clear and convincing evidence rather than by the preponderance standard prescribed in §1481(c). We are in fundamental disagreement with these conclusions.

* * *

(266) "We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid

*In *Patterson*, this Court upheld New York's rule of placing on the defendant the burden of proving by the preponderance of the evidence the affirmative defense of extreme emotional disturbance when charged with the crime of second degree murder.

> under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Addington* v. *Texas*, ___ U.S. ___ (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa* v. *United States*, *supra*. But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby* v. *Immigration Service*, 385 U.S. 276, 285 (1966) (deportation); *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943) (denaturalization). None of these cases involved a congressional judgment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence."

It is respectfully submitted that parent-child custody is more a matter of State concern that Federal and the New York State Legislature "has not exceeded its powers by requiring proof • • • by a preponderance of evidence" as Congress has done with citizenship cases.

It is presumed that the Legislature of the State of New York acted with full knowledge of the facts and for the purpose of protecting both the interest of the parent and the child. In *Atchison, T. & S.F.R. Co. v Matthews*, 174 US 96, this Court stated in part as follows (104):

"* * * It is * * * a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. * * *"

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
December 24, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Social Services Law:

"§384-b. Guardianship and custody of destitute or dependent children; commitment by court order

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

* * *

7. (a) For the purposes of this section, 'permanently neglected child' shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, 'to plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances

available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, 'diligent efforts' shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health."

Family Court Act:

"§611. Permanently neglected child; purpose of part

"The purpose of this part is to provide the procedures for proceedings initiated in family court, pursuant to section three hundred eighty-four-b of the social services law, for the commitment of the guardianship and custody of a child upon the ground that the child is a permanently neglected child. As used in this part 'permanently neglected child' shall mean permanently neglected child as defined in subdivision seven of section three hundred eighty-four-b of the social services law, and unless the context requires otherwise, the provisions of such section three hundred eighty-four-b shall be deemed applicable requirements in addition to the procedures contained in this part. All references in this part to petitions and proceedings initiated 'under this part' shall be deemed references to petitions and proceedings initiated under section three hundred eighty-four-b of the social services law upon the ground that the child is a permanently neglected child."

"§614. Originating proceeding for the commitment of the guardianship and custody of a permanently neglected child

1. A proceeding for the commitment of the guardianship and custody of a child on the ground of permanent neglect is originated by a petition, alleging:

(a) the child is a person under eighteen years of age;

(b) the child is in the care of an authorized agency;

(c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be

detrimental to the best interests of the child and specifying the reasons therefor;

(d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so; and

(e) the best interests of the child require that the guardianship and custody of the child be committed to an authorized agency or to a foster parent authorized to originate this proceeding under section three hundred ninety-two of the social services law or section one thousand fifty-five of this act.

2. Where the petitioner is not the authorized agency, allegations relating to the efforts of the authorized agency may be made upon information and belief."

"§622. Definition of 'fact-finding hearing'

"When used in this part, 'fact-finding hearing' means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of subdivision one of section six hundred fourteen are supported, by a fair preponderance of the evidence."

"§624. Evidence

"Only competent, material and relevant evidence may be admitted in a fact-finding hearing; only material and relevant evidence may be admitted in a dispositional hearing. Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition under this part shall be inadmissible in the fact-finding hearing. Such evidence may be admitted in the dispositional hearing but shall not, of itself, be sufficient as a matter of law to preclude or require an order committing the guardianship and custody of the child."

Office-Supreme Court, U.S.
FILED
MAY 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

vs.

BERNHARDT S. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

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QUESTION PRESENTED

Whether Section 622 of the New York Family Court Act is unconstitutional because it permits the Family Court to terminate parental rights based upon a "fair preponderance of the evidence."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

vs.

BERNHARDT S. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Family Court, Ulster County is unreported. The opinion of the Appellate Division, Third Department is reported at 76 A.D.2d 837, 427 N.Y.S.2d 319. No other opinions have been rendered.

JURISDICTION

Petitioner's appeal to the New York Court of Appeals was dismissed on September 16, 1980. Their petition for a writ of certiorari was filed in this Court on December 13, 1980. The petition was granted by this Court on March 23, 1981. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law, . . .

The statutes which this case involves are New York Family Court Act §§611, 614, 622-626, 631-634 and New York Social Services Law §384-b. These are set forth in full in Appendix A, *infra.*

STATEMENT OF THE CASE

Petitioners John Santosky II and Annie Santosky (also referred to as "the father" and "the mother" respectively) are the parents of five children, three of whom are the subjects of these proceedings. On April 10, 1979, the Ulster County, New York Family Court issued orders permanently terminating petitioners' parental rights with respect to Tina Frances Apel, born on April 15, 1971, John Santosky III, born on August 22, 1973, and Jed Santosky, born on August 19, 1974. [J.A. 41-46]

Tina Apel was removed from petitioners' home by respondent Bernhardt S. Kramer and the Ulster County Department of Social Services (the Department is also referred to hereinafter as respondent) and has been in a foster home since November 20, 1973. [J.A. 19] John Santosky III was removed from petitioners' home by respondent on August 19, 1974. [J.A. 5] On the same day the mother gave birth to her third child, Jed Santosky. On August 22, 1974, when he was three days old and still in the hospital maternity ward, respondent took temporary custody of Jed. [J.A. 6] Each of the children were adjudicated neglected children within the meaning of Article 10 of New York's Family Court Act and placed with respondent for an initial period of eighteen months. [J.A. 19-20] At the expiration of their respective periods of placement, extensions of placement were duly ordered by the Family Court. *Id.*

On September 8, 1976, respondent made his first attempt to terminate petitioners' parental rights to these children by filing petitions under Article 6 of the New York Family Court Act.[1] (*Matter of Santosky*, 89 Misc.2d 730, 393 N.Y.S.2d 486 (Fam. Ct. Ulster Cty. 1977)). Respondent sought to terminate petitioners' parental rights at that time on the theory that petitioners had failed "to plan for the future of their children" as prescribed by section 614, subd. 1(d) of the Family Court Act (hereinafter referred to as Fam. Ct. Act).[2] *Matter of Santosky*, 89 Misc.2d at 732-733, 393 N.Y.S.2d at 488.

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[1]New York separates the neglect and permanent neglect proceeding. In a number of states, however, permanent termination of all parental rights may be ordered at the initial neglect proceeding. *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1316 n.47 (1980).

[2]Termination of parental rights in New York serves the principle purpose of eliminating the requirement that the parent consent to the

(continued)

After conducting a hearing on the matter, the Family Court, Ulster County (Elwyn, J.) dismissed the petition, having found by a preponderance of the evidence that there was insufficient ground to sustain the petition to terminate petitioner's parental rights. *See Matter of Santosky, supra.* [J.A. 19] Although the Family Court regarded the question of the adequacy of the parents' plan to be close, the court was "willing to give the [petitioners] the benefit of the doubt." 89 Misc.2d at 740, 393 N.Y.S.2d at 493. Respondent pursued his attempt to terminate parental rights by appealing to the Supreme Court, Appellate Division. On appeal, that court affirmed. *Matter of John W.*, 63 A.D.2d 750, 404 N.Y.S.2d 717 (Third Dept. 1978). In affirming the Third Department specifically held:

> The Family Court found that respondents had made a good faith effort to cooperate with the agency in its plans for the children's future; that such cooperation, together with a move to more spacious living quarters and the

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(footnote continued from preceding page)

adoption of his or her child in a subsequent proceeding. Termination results in an order committing the guardianship and custody of the child to a non-parent, usually a local commissioner of social services. Commitment of guardianship and custody can be accomplished by four routes: voluntary permanent surrender pursuant to New York Social Services Law § 384 (hereinafter Soc. Serv. L.); when both parents are dead and no guardian has been lawfully appointed, Soc. Serv. L. § 384b(4)(a); when the parents have abandoned the child for six months immediately prior to the initiation of the proceeding, Soc. Serv. L. § 384b(4)(b); when both parents are unable to care for their children by reason of mental illness or mental retardation, Soc. Serv. L. § 384b(4)(c); and when the child is "permanently neglected," Soc. Serv. L. § 384b(4)(d). This case only concerns the last category—permanent neglect. In these proceedings, although the parent has not "abandoned" the child, termination of parental rights is sought because of the length of time the child has spent in foster care and because of a belief that it is unlikely the child will be returned home in the foreseeable future.

> father's improvement of his job skills, constituted planning by conduct; and that respondents acted to accomplish the agency's plan. In our view, these findings are sufficiently supported in the record. Considering the record as a whole, we are of the opinion that respondents have substantially planned for the future of the children. . .

63 A.D.2d at 751, 404 N.Y.S.2d at 719.

Since the time respondent took custody of petitioners' three children, petitioners have had two other children, James, who was born in January, 1976, and Jeremy, who was born in late summer, 1978. [T 393]* Both of these children are being cared for by petitioners at this time and no report of suspected abuse or neglect as to these children has ever been made. [T. 393, 397-390]

On October 16, 1978, respondent filed a second set of petitions to terminate permanently petitioners' parental rights with respect to Tina, John III and Jed on the ground that the children were permanently neglected as defined by section 384-b(7) of the New York Social Services Law.[3] [J.A. 2-7] Those petitions commenced the proceedings

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*[T.] refers to the page number of the transcript of the hearings held in the Ulster County Family Court on January 23, 26, 31 and February 1, 1979.

[3]A permanently neglected child is defined by section 384-b(7)(a) of the New York Social Service Law as

> a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

The relevant New York statutes are set forth in full in Appendix A, *infra*.

which brought the case ultimately to this Court. At the time the second set of petitions to terminate parental rights were filed, the placement of the children in respondent's custody had been twice extended by the Family Court. [J.A. 19-20] The petitions alleged that respondent (petitioner in the Family Court):

> has made diligent efforts to encourage and strengthen the parental relationship in that
>
> (a) The petitioner arranged to bring the children to the Santosky's for visits with the respondents on an average of twice a month.
>
> (b) The petitioner encouraged the respondent, Annie Santosky to attend the Child Enrichment Program offered by Family Service Center to mothers with pre-school children, and which program included the use of a parent aid. Transportation to the program was also offered.
>
> (c) The petitioner arranged for and paid for psychological evaluations of both respondents, and a complete neurological evaluation of respondent, John Santosky, at St. Frances Clinic, Poughkeepsie. Transportation was also provided.
>
> (d) The petitioner offered follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.
>
> (e) The petitioner arranged for counselling sessions for respondents with Elizabeth Smith of Family Service Center.
>
> (f) The petitioner offered birth control counselling at Planned Parenthood.
>
> (g) The petitioner offered vocational training to the Respondent, John Santosky at the Adult Learning Center.
>
> (h) The petitioner offered educational assistance to Respondent, John Santosky at the Adult Learning Center.

(i) The petitioner has provided nutrition aid services to respondent Annie Santosky since November 1977.

(j) The petitioner offered Homemaker Service to help the respondents immediately prior to and after the birth of the recent infant in June, 1978.

(k) The petitioner has provided Public Assistance, Food Stamps and Medicaid to the respondents. The total value of all services offered to the respondents since November 1976 exceeds $16,000.

[Petition, ¶6; J.A. 3, 6-7]

In addition, the petitions, tracking the language contained in Fam. Ct. Act §614, alleged that:

(N)otwithstanding such efforts:, the (parent(s)) (have) failed for a period of more than one year following the date the children came into the care of Petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of each child although physically and financially able to do so.

[Petition, ¶7; J.A. 3]

Finally, the petitions alleged that:

The best interests of said child require the commitment of the guardianship and custody of each child to Petitioner, (an authorized agency) for the following reasons:

1. Respondents cannot or will not provide a normal family home for the children.

2. Each of the children has been in foster care for a continuous period in excess of four years and continued foster care is not an appropriate plan.

3. Professional psychiatric consultants have evaluated the children and have advised that a permanent alternative home should be sought for the children.

[Petition, ¶8; J.A. 3, 7]

A fact-finding hearing was held before Judge Elwyn in the Family Court, Ulster County on January 23, 26, 31 and February 1, 1979.[4] At the commencement of the fact-finding hearing, counsel for petitioners challenged the constitutionality of Fam. Ct. Act §622 was unconstitutional because it authorized termination of parental rights upon proof supported only by a "preponderance" of the evidence. He asserted that the Due Process clause of the Constitution required a higher standard; namely, proof sustained by "clear and convincing" evidence. [T. 8-9]

To sustain his petition, respondent had to prove four separate points at the fact-finding stage: a) that the children were under the age of eighteen years, b) that the children were in the care of an authorized agency, c) that respondent had "made diligent efforts to encourage and strengthen the parental relationship" and d) that petitioners, notwithstanding respondent's efforts, had "failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." [Fam. Ct. Act § §614 and 622]

There was no dispute respecting the age of the children or the length of time they were in respondent's care. Accordingly, the thrust of respondent's case was to document their own "diligent efforts" and the failure of petitioners to maintain contact or plan for the future of their children.

[4]In New York, the permanent neglect proceeding is bifurcated into a fact-finding and dispositional phase. A fact-finding is defined by the New York statute as "a hearing to determine whether the allegations required by paragraphs (a) (b) (c) and (d) of subdivision one of section six hundred fourteen are supported by a fair preponderance of the evidence." Fam. Ct. Act §622.

Specifically, respondent offered testimony, through two case workers assigned to the family, that he had arranged and offered the eleven services enumerated in paragraph six of the petition set forth above. [J.A. 31]

Although the petition alleged that petitioners failed to maintain contact with their children, testimony clearly indicated that petitioners never missed a visit with their children which was arranged by respondent. [T. 50] In the words of the decision of the Family Court, "It was not contended nor was any proof offered at trial that the parents had failed to maintain contact with their children. On the contrary it is conceded that they have through their counsel, diligently sought to have permitted to them such contact through supervised visits as the agency would allow." [J.A. 20] In fact, early in 1977, only one month after the Family Court denied respondent's first attempt to terminate petitioners' parental rights, respondent himself sought to eliminate visitation altogether and petitioners' right and desire to visit had to be restored through the intervention of the Family Court. [T. 50, 53-59; J.A. 20]

Rather than attempt to prove that petitioners failed to maintain contact with their children, respondent contended (as in his first effort to terminate petitioners' parental rights) that petitioner's failed "to plan for the future of their children" within the meaning of the statute.[5]

Respodnent attempted to prove that petitioners failed to plan principally by showing that petitioners rejected several of the services offered to them. Nevertheless, respondent's own witness, caseworker *Dan Lucy*, testified that petitioners

[5]Under New York substantive law, failure to plan for the future of one's child, in and of itself, is sufficient to support a finding of permanent neglect. *Matter of Orlando F.*, 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976).

had accepted Family Service Counseling [T. 59], accepted the services of a nutritional aid [T. 62], and never rejected the services of a public health nurse. [T. 65]

Caseworker *Lynn Davis,* another one of respondent's witnesses, testified that the mother made every visit with her children ever held or offered by the agency [T. 89-90], that during the visits petitioners displayed an attempt at affection toward the children [T. 128] and that during the visits the mother consistently asked the two older children how they were doing in school. [T. 129]

Of the services offered by respondent, the record indicates that petitioners were accused of refusing five, but the circumstances under which they were "refused" casts doubt upon the accusation that they were rejected at all. First, they refused to participate in the Child Enrichment Program because it required them to bring to the Family Service Center the two children over whom they still had custody. Ms. Davis acknowledged that petitioners did not trust the Department of Social Services [T. 155] and that the reason the mother did not participate in the Child Enrichment Program was because of her fear that the two children currently in her care might be taken by respondent, as had been done to Jed at the hospital when he was born. [T. 156-158, 257] Second, petitioners refused the offer of psychiatric counseling at Southern Ulster Mental Health Center because they had received counseling there a number of years before which they considered ineffective. In its place, petitioners preferred to continue and did continue regular counseling sessions with the more successful Family Service Center, a duly authorized counseling agency of respondent. [T. 158-162, J.A. 16-18] Third, the mother rejected the offer of Planned Parenthood services because she planned to have a tubal ligation after the birth of her last child. [T. 106]

Fourth, the mother rejected the offer of Homemaker Service because she was receiving nutritional and homemaking services by the Cooperative Extension Department of Home Economics on a regular basis throughout the period of the children's placement. [T. 167, 267-274] Finally, the father stopped participating in employment related educational services offered by respondent in November 1977 because he obtained a non-paying job as an apprentice auto mechanic. [T. 131-132, 293-297] There is no dispute that petitioners fully participated in and accepted all of the other services offered.

There was also testimony that one of the reasons Ms. Davis concluded that petitioners failed to plan for the return of their children was that petitioners became the parents of a fifth child while the first three were still in respondent's custody. [T. 166]

Additionally, *Anna Whaley,* a nutritional aide who serviced petitioners over a period of several years, testified for petitioners that the mother kept a tidy kitchen and home [T. 275], that she dound the petitioners cooperative over many years [T. 271-273] and that she noticed an improvement in petitioners' budgeting capabilities [T. 283].

Millicent Van Demark, a Public Health Nurse, testified that petitioners have two children in their home, James and Jeremy [T. 393], that on one occasion the mother requested and received for James a speech and hearing evaluation [T. 395] and that no report of abuse or neglect of these two children had been made. [T. 397-398]

After all of the testimony was in, the attorney for respondent, argued, *inter alia,* in summation: "We feel that the fair preponderance of evidence requires a finding of permanent neglect." [T. 418] On March 12, 1979, Judge Elwyn issued a decision that statutory grounds existed to

conclude that the children had been permanently neglected. In his decision Judge Elwyn reviewed the testimony and held:

> I therefore conclude that the record in case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to "plan for the future of [their children] although physically and financially able to do so." [J.A. 37]

The court devoted two full pages to a discussion of petitioners' claim that the standard of proof required by section 622 of the Family Court Act was unconstitutional. After noting that the Attorney General had been notified and elected not to appear, the court stated that "a finding of unconstitutionality should not be lightly undertaken by courts of first instance." The court explicitly decided to terminate petitioners' parental rights "upon the standard of proof prescribed by the statute—'a fair preponderance of the evidence.' " [J.A. 29-30]

On April 5, 1979, the Family Court held a dispositional hearing and ruled that the best interests of all three of the children require that their parents' custody be terminated permanently and that the guardianship and custody of the children be committed to respondent. [J.A. 39-40] On the same date, the court issued final orders terminating petitioners' parental rights. [J.A. 41-46]

Petitioners then appealed directly to the Court of Appeals, claiming that the sole issue involved was a constitutional question. [J.A. 47] Shortly after the Notice of Appeal was filed, the Family Court, on May 8, 1979 stayed all proceedings to enforce the order it issued on April 5 including the authority of respondent to consent to an adoption of the children pending the outcome of petitioners' appeal. [J.A. 48-29]

On June 14, 1979 the Court of Appeals declined jurisdiction lby ruling that issued other than the constitutional question were involved. The court transferred the matter to the Appellate Division, Third Department. [J.A. 50]

After full briefing on appeal, the Appellate Division affirmed the orders of the Family Court, and in doing so, it upheld the constitutionality of section 622, adhering to an earlier decision on the same issue. In following the earlier case, the court noted that

> the permanent neglect statute . . . recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . . Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional. [J.A. 51]

Petitioners again appealed to the New York Court of Appeals challenging the constitutionality of section 622 [J.A. 54] which dismissed the appeal on September 16, 1980 upon the ground that no substantial constitutional question was directly involved. [J.A. 55]

Finally, petitioners petitioned this Court for a writ of certiorari to the Appellate Division, Third Department and, on March 23, 1981 this Court granted the writ.

SUMMARY OF ARGUMENT

The Ulster County Department of Social Services succeeded in severing, permanently and irrevocably, the parent-child relationship of petitioners and three of their children by presenting evidence which established merely that the existence of certain facts was more probable than their non-existence. The New York statute expressly

authorizes termination of parental rights based on a standard of proof which is designed to result in erroneous findings a substantial percent of the time. The Constitution prohibits state action which destroys "essential," "basic" and "fundamental" liberty interests of citizens on the basis of such uncertainty.

The total extinction of a familial relationship between children and their parents is among the most drastic measures that a State can impose. Before a State may interfere with basic rights to this degree, it should be obliged to present a convincing case. Raising the standard of proof in parental rights termination cases will do much to reduce erroneous and inappropriate permanent separation of parents and their children.

Not only does the decision to terminate parental rights interfere in a drastic way with fundamental rights, the substantive basis for the decision is highly subjective. As a result, the error margin is even greater than when a decision is based on objective, hard facts. In New York, for example, parents who comply with all of the obligations imposed upon them by statute, may nevertheless find their parental rights terminated if a court finds an absence of "concerned parenthood."

The subjective basis for termination poses a particular danger that termintion will be inappropriately ordered. A significant risk exists that decisions to terminate are based on cultural and class biases. A disaproportionate proportion of parents whose parental rights are involuntarily seevered are poor.

In addition, a county prosecuting a termination proceeding may have an economic incentive to win the hearing, saving forster-case money once the child is adopted. The county may spend unlimited sums prosecuting the case. By

contrast, the indigent parent is entitled to assigned counsel in New York who earns a maximum of $500. Finally, the risk that courts will interpret the preponderance of evidence standard to signify *weight* rather than *quality* is exacerbated in these circumstances.

Though the State has a *parens patriae* interest in helping children in need, no State interest is served by wrongfully terminating a parent-child relationship. The State should be obligated to prove a convincing case for termination before a court may order the permanent destruction of a family.

ARGUMENT

POINT

SECTION 622 OF THE NEW YORK FAMILY COURT ACT, INSOFAR AS IT PERMITS A FINDING OF PERMANENT NEGLECT AND TERMINATION OF PARENTAL RIGHTS BASED UPON A PREPONDEANCE OF THE EVIDENCE, VIOLATES DUE PROCESS OF LAW.

This case requires the Court to decide whether parents may have their rights terminated involuntar y and permanently, based upon proof which has not been established by at least clear and convincing evidence. Alternatively phrased, this case raises the question whether the Due Process Clause of the Fourteenth Amendment is offended when parental rights are terminated based upon a mere showing of a preponderance of evidence. In deciding this single, narrow issue, the Court is not required to consider the substantive bases upon which termination decisions are based.[6]

---

[6]Petitioners have not challenged New York's substantive standards for terminating their parental rights. Several courts have in recent years addressed substantive standards in termination cases. *E.g. Roe v. Conn,*

(continued)

A. Whether Process Is Due?

To determine what process, if any, is due, the first inquiry for the Court is whether petitioners have asserted an interest which is within the Fourteenth Amendment's protection:

> [T]o determine whether due process requirements apply in the first place we must look not to the "weight" but to the *nature* of the right at stake . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 841 (1977) (citing *Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972).

It is well settled that "the right . . . to raise one's children" is fundamental, and that the "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment is impaired by the permanent separation of parents and children. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Summarizing illustrative decisions, the Court there stated:

> The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson,* 345 U.S. 528, 533 (1953) . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399 . . .

(footnote continued from preceding page)

417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court, Iowa,* 545 F.2d 1137 (8th Cir. 1976), *affirming per curiam* 406 F. Supp. 10 (S.D. Iowa 1975); *Davis v. Smith,* 266 Ark. 112 583 S.W.2d 37 (1979). Earlier this Term, this Court had the opportunity to address substantive standards as well as the issue which is raised in this case, but dismissed the appeal "for want of a properly presented question." *Doe v. Delaware,* ____ U.S. ____, 49 U.S.L.W. 4250 (1981).

The rights of the family to be free from significant state interference is recognized as fundamental in American jurisprudence. The right of parents to raise their children is a pre-constitutional right "having its origins entirely apart from the power of the State," *Smith v. Oranization of Foster Families for Equality and Reform*, 431 U.S. at 845 "deeply rooted in our Nation's history and tradition," *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) and "as old and as fundamental as our entire civilization," *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J. concurring).

As this Court recently articulated, "the tradition of parental authority is . . . one of the basic presuppositions of individual liberty." *Bellotti v. Baird*, 443 U.S. at 638.[7] The Court has recognized not only the privacy and integrity of family life but also the unique and special social function that the family serves.

In *Moore v. City of East Cleveland*, the Court said

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. 431 U.S. 494, 503-504 (1977) (footnotes omitted).

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[7]The Court has recognized a right of parents or families to be free from unnecessary state interference under a theory of *privacy*, e.g. *United States v. Orito*, 413 U.S. 139, 142 (1973); *Roe v. Wade*, 410 U.S. 113, 152-53 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *liberty*, e.g. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632–639-40 (1970); *Wisconsin v. Yoder*, 406 U.S. 205, 230-35 (1972); *Stanley v. Illinois*, 415 U.S. 645, 651 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923); or *integrity*, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961).

These cases demonstrate beyond question that freedom to raise one's children without unnecessary state intrusion into family relationships is protected by the Due Process Clause of the Fourteenth Amendment. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40 (1974).

B. What Process Is Due?

Having determined that petitioners have a liberty interest in retaining their parental ties to their children, which is protected by the Due Process Clause of the Fourteenth Amendment, the question remains, what process is due. In determining the exact parameters of procedural safeguards required by the Due Process Clause, this Court has promulgated a three-prong test:

> First the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Applying this test to the issue raised in this case requires a determination that the preponderance of the evidence standard is constitutionally inadequate.

1. Private Interest Affected Is Fundamental

One of the most significant factors to be considered in determining the scope of due process protection is the nature of the priate interest affected by the official act. *Mathews v. Eldridge,* 424 U.S. at 335. In this case the state deprived

petitioners—permanently—of their right to raise, visit with, shape the future of and be related to three of their children. It is scarcely possible to conceive of a right more fundamental in a constitutional sense, or one which has been more scrupulously protected by this Court.

Although the severity of the loss does not of itself establish that an interest deserves constitutional protection, this factor does weigh heavily in determining the procedural safeguards mandated by the Fourteenth Amendment. *See Gross v. Lopez*, 419 U.S. 565, 575-576 (1975). Recently, the Fifth Circuit Court of Appeals commented: "It is difficult to imagine a loss more grievous than that of a parent deprived of his or her child. The bond between parent and offspring is one of the central facts of nature as well as of society and the Supreme Court has frequently noted the fundamental character of this relationship." *Davis v. Page*, 640 F.2d 599, 603 (5th Cir., 1981) (en banc).[8]

The Third Circuit also had occasion very recently to characterize involuntary permanent termination of parental rights

> The total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions, to protect disadvantaged or neglected children. The termination of the mother's rights in her children is, in effect, a declaration to the children that their mother is legally dead. *Lehman v. Lycoming County Children's Services Agency*, ____ F.2d ____, ____ (3rd Cir. 1981) (en banc) (Rosenn, J., dissenting).

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[8]The original Panel which decided *Davis* was even more emphatic:

> [The l]oss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. *Davis v. Page*, 618 F.2d 374, 379 (5th Cir., 1980).

See also, In re William L., 477 Pa. 322, 370, 383 A.2d 1228, 1252 (Manderino, J., dissenting), *cert. denied*, 439 U.S. 880 (1978). "When parental rights are terminated, the child is dead so far far as that parent is concerned." Indeed, termination has been called the "death penalty" for parents of dependent or neglected children. Catz & Kuelbs, *The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. Fam. L. 223, 233 (1974).

There can be little doubt that termination of the parent-child relationship entails a "significant deprivation of liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979). While there may be no threat of jail, a clear form of physical separation from one's family is imposed when a parent is told he or she will never again live in the same household or never again have any other continuing relationship—even visitation—with his or her own child. Termination "is even more final than involuntary commitment or delinquency proceedings," *State v. Robert H.*, 20 N.H. 90, 393 A.2d 1387, 1389 (1978) and a "drastic, final step which, when improvidently employed, can be fraught with danger," *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

When the state seeks to extinguish the tie that binds parent to child permanently, only the most "powerful countervailing interest[s]" can outweigh the rights abridged by termination. *See, Stanley v. Illinois*, 405 U.S. at 651. When fundamental rights are absolutely threatened, the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). As a result of these principles, the only two federal courts which have addressed the issue, have held that termination proceedings

must be proven by clear and convincing evidence. *Sims v. State Dept. of Public Welfare,* 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds sub nom., Moore v. Sims,* 442 U.S. 415 (1979); *Alsager v. District Court,* 406 F. Supp. at 25, *aff'd on other grounds,* 545 F.2d 1137.[9]

2. The Risk of Erroneous Deprivation Is High.

The second element to be considered in determining what process is due is the value of additional procedural safeguards and the extent to which they will prevent an erroneous deprivation of rights. *Mathews v. Eldridge,* 424 U.S. at 335. As a due process protection, a heightened standard of proof serves an integral and often determinative role in limiting governmental overreaching.

Indeed, this prong of the *Mathews* test hardly needs discussion in the context of the necessary degree of proof. The explicit purpose of raising the standard from a mere preponderance of evidence is to reduce erroneous decisions. This Court has recognized this function in unequivocal terms:

> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of [the salient facts by a higher standrd than mere preponderance of evidence]. In *re Winship,* 397 U.S. 358, 364 (1970) (citing *Speiser v. Randall*), 357 U.S. 513 (1957).

[9]Recently, a New York Family Court Judge expressed her view in *dictum* that the Constitution requires the finding of permanent neglect to be made by clear and convincing evidence. *In re Marilyn H.,* ___ Misc.2d ___, 7 Fam. L. Rep. 2347 (Fam. Ct. N.Y. Cty. February 24, 1981).

The standard of proof ultimately "reflects the value society places" on the interest at stake. *Addington v. Texas,* 441 U.S. at 425. It also "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship,* 397 U.S. at 370 (Harlan, J., concurring). As Justice Harlan explained, "[T]he choice of the standard for a particular adjudication does . . . reflect a very fundamental assessment of the comparative social costs of erroneous factual determination." *Id.*

The "social costs" of erring in the unnecessary destruction of a family are appalling indeed. For this reason, and because the right to live as a family is fundamental and constitutionally protected, a standard of proof which permits the court to err on one side as easily as the other offends the very essence of due process of law. *In re Winship, supra.*

As demonstrated in the previous section, the rights at issue in this case are among our most precious. As a result, this case is easily distinguishable from the typical civil proceeding. Where the interests are essentially proprietary, that is, in "the general run of issues in civil cases" [McCormick, *Evidence* §319, (1972)], the preponderance test is appropriate. Where the interests are more significant, for example in cases involving allegations of civil fraud, legitimacy of a child, adultery, or lost wills, a higher standard is required. *See Woodby v. Immigration and Naturalization Service,* 385 U.S. 276, 285 n.18 (1966); McCormick, *Evidence* §§319, 320. *See also, Rosenbloom v. Metromedia,* 403 U.S. 29, 50-52 (1971) (plurality opinion) (civil libel action involving First Amendment protection). When the State contends that the basic right of parenthood must be forsaken, it assumes an onerous burden of proof. Congress,

for example, requires proof beyond a reasonable doubt before Indian parental rights may be permanently terminated, 25 U.S.C. § 1912(f) (1981 Supp.), reasoning, in part, that permanent termination "is a penalty as great, if not greater, than a civil penalty . . ." 6 U.S. Cong. & Adm. News 7545 (1978).[10]

The standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. at 423. There can be no doubt that both the parent and the child have a significant interest in preventing the erroneous termination of this fundamental human relationship. Moreover, the gravity of an improvident termination decision is underscored by the fact that, unlike an initial erroneous decision to commit an individual to an institution, which may be corrected when the individual's case is periodically reviewed by the professional staff, the decision to terminate the parent-child relationship permanently and irrevocably destroys the family unit. *Cf. Addington v. Texas*, 441 U.S. at 428-429. Under these circumstances, the standard of proof in a termination proceeding must be at least equal to the standard required in civil commitment cases.

a. New York's Substantive Basis for Termination is Highly Subjective.

The import of a heightened standard of proof for protecting parents from erroneous decisions is clearly illustrated by

[10]*See also Moore v. Sims*, 442 U.S. 415, 423 (1979) wherein this Court, recognized, albeit in a different context, that child abuse proceedings are "in aid of and closely related to criminal statute."

its practical application in the termination hearing. In any proceeding, the correctness of the factfinder's ultimate conclusion can never be established with absolute certainty. Whether a higher stanard of proof should be imposed, partially depends on the inherent certainty of the underlying facts which cumulatively add up to the ultimate decision. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 Cal. L. Rev. 242 (1944). The less certain each of the elements of proof are, the less certain the cumulative conclusion. One way of increasing the certainty of a conclusion based on highly subjective evidence is to raise the standard proof.[11]

It has long been recognized that child protective cases may too easily be decided on the subjective values of the judges. As this Court has noted: "Judges . . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. at 835, n.36. *See, also,* Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication,* 44 Brooklyn L. Rev. 63, 64, n.4 and 79, n.103 (1977).[12]

[11]The common law traditionally imposed a higher standard of proof—clear and convincing evidence—on litigants whose claims were based on the less reliable *oral* evidence, e.g. for the existence and contents of a lost deed or will or for an oral contract. *See* 9 Wigmore, *Evidence* § 2498 (3d ed. 1940 Supp. 1980).

[12]In one study in which three experienced juvenile court judges were given files concerning fifty actual families and asked if the parents' rights in their children should be terminated, the judges agreed in less than one-half of the cases. "Even in cases in which they agreed on the decision, the judges did not identify the same factors as determinants, each seeming to operate to some extent within his own unique value system." Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Ed. Rev. 599, 619 (1973).

New York's substantive standards for terminating parental rights are highly subjective. Social Services Law §384-b(7)(a) provides:

> "Permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationships when such efforts will not be detrimental to the best interests of the child . . ."

Thus, the three critical issues upon which courts must focus in permanent neglect proceedings are the duty of parents to 1) maintain contact or 2) plan, and the duty of the agency to 3) utilize diligent efforts to encourage and strengthen the family. New York court interpretations have made it clear that these standards are not objective.

i. Maintain Contact.

A parent may not, for a period of one year, fail to "substantially and continuously or repeatedly" maintain contact with the child. Maintaining contact by itself will not preclude a court from terminating parental rights. Soc. Serv. L. §384-b(7)(b) clearly provides that "evidence of insubstantial or infrequent contacts by a parent with his or her shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child." In addition, a visit or communication by a parent with the child which "overtly demonstrate(s) a lack of affectionate and concerned parenthood" may be disregarded as insubstantial. *Id.*

ii. Plan for the Future.

A parent who fails to "substantially and continuously or repeatedly" plan for the future of the child may permanently lose parental rights. By statute, planning is defined as

> such steps as may be necessary to provide an adequate, stable home . . . within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. Soc. Serv. L. § 384-b(7)(c).

When is a plan "realistic"? When is a period of time "reasonable under the financial circumstances available to the parent"? New York's highest court has ordered permanent termination in a case where, though proof of a plan by the parents existed, a preponderance of the evidence supported the conclusion that the parents failed "to formulate, and act to accomplish, a feasible and realistic plan." *Matter of Orlando F.*, 40 N.Y.2d 103, 111, 386 N.Y.S.2d 64, 68 (1976).

The Court of Appeals in New York has recognized that

> the planning also obligates the parents to project a future course of action, taking into account considerations of how the child will be supported financially, physically and emotionally. Certainly, a degree of prescience and insight that some people lack—especially the parents of a child who has been involuntarily removed from their custody—is demanded. For this reason, the adequacy of the parents' plan must not be evaluated with reference to unrealistically high standards. *Matter of Leon R.R.*, 48 N.Y.2d 117, 125, 421 N.Y.S.2d 863, 868 (1979).

The preponderance of evidence standard permits an inordinate risk that the plan will be evaluated with reference to unrealistically high standards.[13]

iii. Agency's Diligent Efforts.

As a general rule, a finding of permanent neglect may only be made if the agency utilized "diligent efforts to encourage and strengthen the parental relationship." Soc. Serv. L. §384-b(7)(a). However, the Court of Appeals has interpreted the law so that "(d)iligent efforts at encouraging and strengthening the parental relationship may not be made at the expense of the moral and temporal welfare of the child." *Matter of Ray A.M.*, 37 N.Y.2d 619, 621, 376 N.Y.S.2d 43, 433 (1975). *See* Fam. Ct. Act §614(c).

Thus, under New York law a court may terminate parental rights where it finds by a preponderance of evidence that a) the absence of diligent efforts by an agency to reunite the parentand child was excusable as not being in the child's best interests and b) even though the parents have maintained contact or planned for the future of the child in good faith, there was an absence of "concerned parenthood" or the plan was not "realistic."

New York law expressly permits terminating parental rights irrespective of the subjective intent of the parent to maintain contact with, abandon or plan for the return of the

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[13]A higher standard of proof is needed in termination cases than in ordinary civil cases, in part "(b)ecause precedent is of little value, [and] adequate protection of the parental right requires that the decision makers be well convinced of the appropriateness of termination." Note, *Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine*, 12 Tulsa Law J. 528, 542 (1977).

child. Soc. Serv. L. § 384-b(5)(b). This stands in sharp contrast with *Vance v. Terrazas*, 444 U.S. 252, 270 (1980) in which this Court allowed a citizen to lose his citizenship based upon a preponderance of the evidence which proved that the citizen actually possessed "an intent to relinquish citizenship." It is because "expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship" and that this is a "heavy burden" for the Government to meet, that the preponderance standard was found to be constitutionally acceptable. *Vance v. Terrazas*, 444 U.S. at 267.

b. Termination Proceedings Are Particularly Vulnerable to Cultural and Class Bias.

In addition to the subjectivity of the substantive law itself, other factors involving termination proceedings indicate the need for a higher standard of proof. Among these are the possibility of cultural and class bias and the comparative advantage which the state enjoys over the parents in the termination hearing.

The vast majority of parents who are accused of inadequate parenting are indigent.[14] Termination proceedings

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[14] "Nationwide data on the income of families placed in foster care do not exist, but statewide studies indicate that at best eighty to ninety percent of such families are below the poverty line and the majority receive public assistance." McCathren, *Accountability In the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect*, 57 B.U.L. Rev. 707, 711-712, n.17 (1977) and authorities cited therein.

See, also Dembitz, *Child Abuse and the Law—Facts and Fiction*, 24 Record of N.Y.C.B.A. 613, 623 (1969); Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 Fam. L. Q. 245, 262 (1974); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for*

(continued)

have been attacked on the basis of cultural and class prejudice. [15]*Cf. Smith v. Oranization of Foster Families for Equality and Reform*, 431 U.S. at 833-35. *See also*, P. Murphy, *Our Kindly Parent—The State*, 153-63 (1974).

Even where bias is eliminated, the poor frequently are disadvantaged. Typically, counsel for the poor is assigned by the court and, in New York paid a modest hourly fee to a maximum amount even lower than an assigned attorney may receive by representing a defendant accused of a felony. New York County Law §722b (McKinney Supp. 1980).

(footnote continued from preceding page)

Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625, 692, n.269 (1976); S. Katz, *When Parents Fail*, at 28-29 (1971); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo L.J. 887, 892-93 (1975); Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 Calif. L. Rev. 694 (1966); Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Ed Rev. 599, 603 (1973); Bourne & Newberger, *"Family Autonomy" or "Coercive Intervention?", Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect*, 57 B.U.L. Rev. 679, 691 (1977); Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 Am. J. Orthopsychiatry 608 (1978); Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interest of the Child*, 78 Mich. L. Rev. 645, 689 (1980); S. Jenkins & E. Norman, *Filial Deprivation and Foster Care* (1972) pp. 2, 25-30; Hay & Phillips, *Poverty and the Law of Custody*, 54 Calif. L. Rev. 717 (1966); ten Broek, *California's Dual System of Family Law: Its Origins, Development and Present Status (Part I)*, 16 Stan. L. Rev. 257; *(Part II)*, p. 900 (1964); *(Part III)*, 17 Stan. L. Rev. 614 (1965); Jenkins, *Child Welfare as a Class System, in Children and Decent People* (Schorr ed. 1974); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833-34 (1977).

[15]In enacting the Indian Child Welfare Act, 25 U.S.C. §§1901 et seq. (1980), Congress found that many of these same evils existed in child custody proceedings involving Indian families. As a result, Congress required that in a proceeding to terminate the parent-child relationship the evidence supporting termination be established beyond a reasonable doubt. 25 U.S.C. §1912(f).

The agency, by contrast, is represented by a county attorney or privately retained counsel. There are no pre-determined limitations set on the amount of money an agency may spend in prosecuting a termination proceeding, confronting the parent with "the full panoply of the traditional weapons of the state." *Davis v. Page*, 618 F.2d at 380. Moreover, there is frequently an incentive to succeed in obtaining a termination order. Where a particular child is considered "adoptable," the state may favor termination of parental rights both because termination assists in satisfying the demand for "adoptable" children and because it relieves the state from the financial burden of providing either institutional and foster care or public services that might be necessary for the reinforcement or rehabilitation of the child's natural family. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.-C.L.L. Rev. 564, 575 (1976).[16] *See also*, Areen, *"Intervention Between parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,"* 63 *Georgetown L.J.*, 887, 893-94 (1975).

Before the child is adopted, counties expend considerable money, both for services provided to parents and payments to foster parents for caring for the children. These payments usually cease upon adoption. Thus, it is to a county's economic advantage to spend an amount necessary at the termination hearing to maximize the probability of a successful outcome. The preponderance of the evidence standard exacerbates this problem.

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[16]In fiscal year 1978, the City of New York spent over $300 million for the foster care of approximately 26,000 children. Office of the New York City Council President, *Good Money After Bad: An Analysis of Expenditures and Performance in Private-Sector Foster Care* (1979).

c. The Preponderance Standard Can Be Misleading.

Chief Justice Burger has observed respecting the standard of clear and convincing evidence that "the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable." *Addington v. Texas,* 441 U.S. at 424-425. At the least, however, clear and convincing evidence precludes an adverse finding against a parent which would otherwise be satisfied by evidence which merely establishes that facts favoring termination are more probable than their non-existence. *Cf.* McCormick, *Evidence,* § 339.[17] In concluding that parental rights should be permanently severed, the constitution requires that the finder of fact be persuaded that the quality of the evidence clearly mandates the outcome.

A problem related to the preponderance standard is that it may be misleading to judges and might suggest that only the *quantity* and not the *quality* of the evidence is what matters. As Justice Harlan pointed out, concurring in *In re Winship,* at least some commentators or courts view the preponderance test as a requirement to weigh in some objective sense the quantity of evidence submitted by each side rather than a requirement that the trier of fact decide what he believes most probably happened. 397 U.S. at 371 n.3. There is especial danger that weight rather than quality will be determinative in termination proceedings in light of the inequitable allocation of resources typically available to agencies and parents in termination proceedings.

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[17]As this Court has recognized, "To experienced lawyers, it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall,* 357 U.S. at 520-521.

Indeed, there is evidence in this very case that the preponderance standard confused at least one attorney and one court. There is no indication in the record that the trial judge based his decision on the fact that petitioners failed to testify at the trial. However, the attorney for one set of foster parents argued to the New York Court of Appeals, in support of a motion to dismiss petitioners' appeal, that since petitioners did not testify at their trial, they were

> unable to refute the evidence that they never substantially planned for the return of their children. Furthermore, by their failure to take the stand, the [petitioners] waived their right to contest the constitutional issue because they failed to give evidence to even show, by a mere preponderance of the evidence, tha tthey substantially performed. Since both [the agency] and [petitioners] have dual burdens to prove in a permanent neglect proceeding, it would be inequitable to have the agency's burden to be greater than the one for [petitioners]. [Affirmation of Wilfrid E. Marrin, Esq., dated July 3, 1980.]

A preponderance standard is so low that at times a court may become confused as to which party bears the burden of proof in the first place. When respondent failed in the Family Court in his effort to terminate petitioners' parental rights the first time, he appealed to the Appellate Division. That Court affirmed the Family court's decision not to terminate. However, even though it is clear that New York's statute places the burden upon the *county* (albeit by a mere preponderance of evidence) of proving, *inter alia,* that the parents have failed to maintain contact or plan for the future of their children, the Appellate Division affirmed based on the reasoning that "Considering the record as a whole, *we are of the opinion that respondents have substantially planned for the future of the children. . . .*" *Matter of John*

W., 63 A.D.2d 750, 751 404 N.Y.S.2d 717, 719 (Third Dept. 1978) (emphasis supplied). The Appellate Division therefore mistakenly assumed that petitioners had a burden to prove that they had planned for their children's future.

3. The State's Interests Are Consistent With Preventing Unnecessary Terminations.

a. *Parens Patriae*

The State's interest in the termination proceeding is the final element in the assessment of what standard of proof is required by due process. *Mathews v. Eldridge*, 424 U.S. at 335. Although the State has multiple interests, one of them is its *parens patriae* interest to provide a permanent home for children. Soc. Serv. L. § 384-b(1)(a)(iv). The Appellate Division relied upon this purpose in upholding the statute:

> [W]e note that the permanent neglect statutue . . . recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents. . . . Accordingly, application of the preponderance of evidence standard is such a proceeding involving these often conflicting rights is proper and constitutional. [J.A. 51]

This reasoning, however, is faulty. New York recognizes—by statutory declaration—that children and parents should be together if at all possible. In enacting the legislation which authorizes courts to terminate parental rights, the legislature specifically declared:

> (i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite if if the child has already left home. Soc. Serv. L. § § 384-b(1)(a)(i), (ii), (iii).

The New York Court of Appeals has recently reemphasized the state's interests in keeping families together and avoiding needless terminations.

> One of the fundamental values in our society is that which respects and fosters the relationship between parent and child. Thus, our permanent neglect statute reflects a cultural judgment that society should not terminate the parent-child relationship unless it has first attempted to strengthen it. *Matter of Leon R.R.*, 48 N.Y.2d at 126, 421 N.Y.S.2d at 869.

At some point when children have been separated from their parents for a significant period of time, termination of parental rights may be appropriate. Thus, New York law posits

> *when it is clear* that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child. Soc. Serv. L. § 384-b(1)(a)(iv) (emphasis supplied).

The only issue before this Court is how best to assure that the decision to terminate is "clear," since New York has no *parens patriae* interest in inappropriately terminating parental rights. A termination proceeding is a conflict between the parents and the state. It may or may not be a

conflict between the parents and their children. The right to family autonomy is a reciprocal right belonging both to children and their parents. *See, Stanley v. Illinois,* 405 U.S. at 647, 652; Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Authority,* 86 Yale L.J. 645, 627, n.8 (1977).

The Second Circuit has recognized that the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children." *Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977). More recently, four judges on the Third Circuit had occasion to say that the right of family integrity "encompasses not only the parent's right to nurture, educate, love and manage their children but the children's right to remain with and be raised by their natural parents." *Lehman v. Lycoming County Children's Services Agency,* ____ F.2d ____, ____ (3rd Cir. March 31, 1981) (en banc) (Rosenn, J., dissenting) (slip opinion).

There can be no presumption that the State is serving the child's interests, nor its own *parens patriae* interest, in seeking to terminate parental rights. The State is simply "too crude an instrument to become an adequate substitute for flesh and blood parents." J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 12 (1979).

Under New York law, it is far from certain that terminating the parent-child relationship will be of any value to the children affected by the order. A finding of permanent neglect may be the first step in a lifetime of alienation from anyone who is truly concerned about the child. In termination proceedings "proof of the likelihood that the child will be placed for adoption shall *not* be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency." Soc. Serv. L. § 384-b(1)(a)(i) (emphasis supplied).

As this Court has recognized:

> [E]ven when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family. *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. at 837-838.

Since adoption is neither a legally necessary predicate nor a realistic expectation of many children who become wards of the State, other forms of custodial care, such as institutionalization, must be utilized with unfortunte and disastrous consequences. Long-term foster care, which is the State's principal alternative resource, can never replace nurturing advantages lost to the child from the breakup of his natural family, and may be distinctly inimical to the needs of children. *See* Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Educ. Rev. at 605-6; *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. at 856 (concurring opinion, Stewart, J.). While the familial environment may be adjudged deficient by predominating standards, the State's intervention, however benevolently intended, may provide equally undesirable or worse alternative. *Alsager v. District Court,* 406 F. Supp. at 23. It is for these reasons that "(w)hen the state contravenes parental decisions in child rearing with the claimed purpose of benefitting the child, the state must present a convincing case that its intervention, in fact, will serve its expressed goal." Burt, *Developing Constitutional Rights Of, In and For Children,* 39 Law & Contemp. Prob. 118, 127 (1975). The higher burden of proof thus protects the parents' interests as well as the rights of children to the care and protection of their parents. The Model Act to Free Children for Permanent Placement drafted by Professor Katz for the Department of Health, Education and Welfare, requires the

clear and convincing standard because it provides "the fairest measure for weighing the claims of the competing interests." Katz, *Freeing Children for Permanent Placement Through A Model Act,* 12 Fam. L. Q. 203, 240 (1978).

The use of the clear and convincing standard reflects the underlying premises of the Constitution and state policy that maintenance of the family unit is the preferred solution by reducing the likelihood of erroneous decisions to terminate the parent-child relationship. Given the parent's interest, the child's interest and the state's interest to avoid a wrongful termination, a higher standard of proof than mere preponderance of evidence actually furthers the interests of all concerned.

b. Fiscal and Administrative Burden

The imposition of a higher standard of proof imposes upon the state no greater fiscal or administrative burden than exists under the present system. No hearing is being requested where one does not exist; no court-appointed counsel with great public expense is desired; no right to appeal nor free transcript is sought. Appellants seek only a shift in focus—an intellectual exercise only—of an already-established process. The speed with which termination cases may proceed and the form of the proceedings will be unaffected by a heightened standard of proof.

Moreover, New York has utilized, with no apparent negative effects, "clear and convincing" proof in a number of analogous contexts. For example, whre the state wishes to terminate parental rights based upon parental mental illness or retardation, the statute requires clear and convincing

evidence. Soc. Serv. L. § 384-b(3)(g). New York also requires clear and convincing proof "to the point of entire satisfaction" in paternity proceedings. *Matter of Renee G. v. William H.*, 46 A.D.2d 823, 360 N.Y.S.2d 514 (3rd Dept. 1974); *aff'd*, 39 N.Y.2d 812, 385 N.Y.S.2d 763 (1976). It is ironic that in New York it is more difficult to prove someone is a parent than it is to destroy the parent-child relationship.

In addition, actions for reformation (*Ross v. Food Specialities, Inc.*, 6 N.Y.2d 336, 189 N.Y.S.2d 857 (1959); and actions based on a claim against a deceased (*Matter of Cady*, 211 App. Div. 373, 207 N.Y.S. 385 (4th Dept. 1925) must be proven by clear and convincing evidence in New York. Even hearing to suspend driver's licenses require clear and convincing evidence in New York. New York Vehicle and Traffic Law, § 227(i) (McKinney Supp. 1980).

Additionally, the administrative burden on the State cannot be too great in light of the fact that thirty-five states require a standard of proof higher than New York's in termination cases. One state—South Dakota—requires a "clear preponderance of evidence." *Matter of B.E.*, 287 N.W.2d 91 (S.D. 1979). Two states—New Hampshire and Louisiana—require proof beyond a reasonable doubt to terminate parental rights. *State v. Robert H., supra;* La. Rev. Stat. Ann. § 13:1603.A (Supp. 1981). And thirty-two states require clear and convincing evidence in termination proceedings, thirteen by statute and nineteen by case law.[18]

[18] *Alabama—Dale County Dep't of Pensions v. Robles*, 368 So.2d 39 (Ala. Civ. App. 1979); *Alaska—Alaska Code* § 47.10.080(c)(3)(D) (1979); *Arkansas—Harpur v. Caskin*, 265 Ark. 588, 580 S.W.2d 176 (1979); *California—Cal. Civ. Code*, § 232(a)(7) (West. Supp. 1980); *District of Columbia—Matter of Adoption of J.S.R.*, 374 A.2d 860 (D.C. 1977); *Florida—In Interest of C.K.G.*, 365 So.2d 424 (Fla. Dist. Ct. App., 2d Dist. 1978); *Georgia—Ga. Code Ann.*, § 24A-2201(c) (1976); *Illinois—Blakey v. Blakey*, 72 Ill. App. 3d 946, 391 N.E.2d

(continued)

Four states—Hawaii, Mississippi, Ohio and Vermont—have no discernible standards from either statutes or case law. Only twelve states, including New York, utilize the preponderance of evidence standard in termination proceedings.[19]

(footnote continued from preceding page)

222 (App. Ct., 4th Dist. 1979); *Iowa—Iowa Code Ann.*, §600A.8 (West Supp. 1980); *Kansas—In Interest of Kerns*, 225 Kan. 746, 594 P.2d 187 (1979); *Maine—Me. Rev. Stat. Ann.*, 22 §4055(1)(B)(2) (Baldwin Supp. 1980); *Michigan—Mich. Comp. Laws Ann.*, §722.25 (Supp. 1980); *Minnesota—Matter of Welfare of Rosenbloom*, 266 N.W.2d 888 (Minn. 1978); *Missouri—Mo. Ann. Stat.*, §211.447.2(2) (Vernon Supp. 1980); *Montana—Matter of J.L.B.*, 594 P.2d 1127 (Mont. 1979); *Nebraska—In Interest of Souza*, 204 Neb. 503, 283 N.W.2d 48 (1979); *Nevada—Sernaker v. Ehrlich*, 88 Nev. 277, 468 P.2d 5 (1970); *New Jersey—J. v. M.*, 157 N.J. Super. 478, 385 A.2d 240 (Super. Ct. App. Div. 1978); *New Mexico—N.M. Stat. Ann.* §40-7-4(J) (Supp. 1980); *North Carolina—N.C. Gen. Stat.* §7A-289.30(e) (Supp. 1979); *North Dakota—In Interest of J.A.*, 283 N.W.2d 83 (N.D. 1979); *Oklahoma—Matter of Darren Todd H.*, 615 P.2d 287 (Okla. 1980); *Pennsylvania—In re William L.*, 477 Pa. 322, 383 A.2d 1228 (1978), *cert. denied*, 439 U.S. 880 (1979); *Rhode Island—R.I. Gen. Laws* §15-7-7 (Supp. 1980); *Tennessee—Tenn. Code Ann.* §37-246(d) (Supp. 1980); *Texas—In re G.M.*, 596 S.W.2d 846 (Tex. 1980); *Utah—In Interest of Pitts*, 535 P.2d 1244 (Utah 1978); *Virginia—Va. Code* §16.1-283(B) (Supp. 1980); *Washington—In re Sego*, 82 Wash. 2 736, 513 P.2d 831 (1973); *Wisconsin—Wis. Stat. Ann.* §48.31(1) (West Supp. 1980); *Wyoming—In re X., Y. & Z.*, 607 P.2d 911 (Wyo. 1980).

[19]*Arizona—Ariz. Rev. Stat. Ann.* §8-537.B (1980); *Colorado—In Interest of M.B.*, 199 Colo. 370, 535 P.2d 192 (1975); *Connecticut—State of Conn. v. Anonymous*, 41 Conn. L.J., No. 12, p. 1 (Sept. 18, 1979); *Delaware—Matter of Five Minor Children*, 407 A.2d 198 (Del. 1979), *app. dism. Doe v. Delaware*, ___ U.S. ___, 49 U.S.L.W. 4250 (1981); *Idaho—Idaho Code* §16-2009 (1979); *Indiana—Ind. Code Ann.* §31-6-7-13(a) (Burns 1980); *Kentucky—Ky. Stat. Ann.* §199.603(1) (Supp. 1980); *Maryland—Coffey v. Dep't of Social Services*, 41 Md. App. 340, 397 A.2d 233 (Ct. Spec. App. 1979); *Massachusetts—Matter of Custody of a Minor*, 393 N.E.2d 379 (Mass., 1979); *New York—N.Y. Fam. Ct. Act* §622 (McKinney 1976); *Oregon—Or. Rev. Stat.* §419.525(2) (1979); *South Carolina—Children's Bureau of S.C. v. Johnson*, 269 S.C. 453, 237 S.E.2d 393 (1977).

CONCLUSION

For the above-stated reasons, petitioners pray that the judgement and order of the Supreme Court of the State of New York, Appellate Division, Third Department be reversed.

Respectfully submitted,

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APPENDIX A

Relevant Provisions of the New York Family Court Act

§611. Permanently neglected child; purpose of part.

The purpose of this part is to provide the procedures for proceedings initiated in family court, pursuant to section three hundred eighty-four-b of the social services law, for the commitment of the guardianship and custody of a child upon the ground that the child is a permanently neglected child. As used in this part "permanently neglected child" shall mean permanently neglected child as defined in subdivision seven of section three hundred eighty-four-b of the social services law, and unless the context requires otherwise, the provisions of such section three hundred eighty-four-b shall be deemed applicable requirements in addition to the procedures contained in this part. All references in this part to petitions and proceedings initiated "under this part": shall be deemed references to petitions and proceedings initiated under section three hundred eighty-four-b of the social services law upon the ground that the child is a permanently neglected child.

§614. Originating proceeding for the commitment of the guardianship and custody of a permanently neglected child.[1]

1. A proceeding for the commitment of the guardianship and custody of a child is originated by a petition, alleging:

(a) the child is a person under eighteen years of age;

(b) the child is in the care of an authorized agency;

(c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be detrimental to the moral and temporal welfare of the child and specifying the reasons therefor;

(d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so; and

(e) the best interests of the child require that the guardianship and custody of the child be committed to an authorized agency or to a foster parent authorized to originate this proceeding under section three hundred ninety-two of the social services law or section one thousand fifty-five of this act.

2. Where the petitioner is not the authorized agency, allegations relating to the efforts of the authorized agency may be made upon information and belief.

§622. Definition of "fact-finding hearing."

When used in this part, "fact-finding hearing" means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of subdivision one of section six hundred fourteen are supported by a fair preponderance of the evidence.

§623. Definition of "dispositional hearing."

When used in this part, "dispositional hearing" means a hearing to determine what order of disposition should be made in accordance with the best interests of the child.

§624. Evidence.

Only competent, material and relevant evidence may be admitted in a fact-finding hearing; only material and relevant evidence may be admitted in a dispositional hearing. Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition under this part shall be inadmissible in the fact-finding hearing. Such evidence may be admitted in the dispositional hearing but shall not, of itself, be sufficient as a matter of law to preclude or require an order committing the guardianship and custody of the child.

§625. Sequence of hearings.

(a) Upon completion of the fact-finding hearing, the dispositional hearing may commence immediately after the required findings are made, provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing.

(b) Reports prepared by the probation service or a duly authorized agency for use by the court prior to the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or

in part to the law guardian, counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing or in the making of an order of disposition without a dispositional hearing pursuant to subdivision (a) of this section.

§626. Adjournments.

(a) The court may adjourn a fact-finding hearing or a dispositional hearing for good cause shown on its own motion or on motion made on bhalf of the child, or on motion of the parent or other person responsible for the care of the child.

(b) At the conclusion of a fact-finding hearing and after it has made findings required before a dispositional hearing may commence, the court may adjourn the proceedings to enable it to make inquiry into the surroundings, conditions, and capacities of the persons involved in the proceedings.

§631. Disposition on adjudication of permanent neglect.

At the conclusion of a dispositional hearing on a petition for the commitment of the guardianship and custody of a child, the court shall enter an order of disposition:

(a) dismissing the petition in accord with section six hundred thirty-two; or

(b) suspending judgment in accord with section six hundred thirty-three; or

(c) committing the guardianship and custody of the child in accord with section six hundred thirty-four.

An order of disposition shall be made, pursuant to this section, solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition.

§632. Order dismissing petition.

(a) If the allegations of a petition under this part are not established, the court shall dismiss the petition.

(b) If a motion has been made in the course of a proceeding under this part to reconsider an underlying order of placement or commitment, the court retains jurisdiction to dispose of that motion regardless of whether it dismisses the petition.

§633. Suspended judgment.

(a) Rules of court shall define permissible terms and conditions of a suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person responsible for the care of the child.

(b) The maximum duration of a suspended judgment under this section is one year, unless the court finds at the conclsion of that period that exceptional circumstances require an extension of that period for an additional year.

§634. Commitment of guardianship and custody; further orders.

The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper.

Relevant Provisions of the New York Social Services Law

§384-b. Guardianship and custody of destitute or dependent children; commitment by court order.

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects

on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

2. For the purposes of this section, "child" shall mean a person under the age of eighteen years.

3. (a) The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act to institute a proceeding under this section, by order of a surrogate or judge of the family court, as hereinafter provided. Where such guardianship and custody is committed to a foster parent, the family court or surrogate's court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke, modify or extend its order, if the foster parent fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent. Where the foster parent institutes a proceeding for the adoption of the child and the adoption petition is finally denied or dismissed, the court which committed the guardianship and custody of the child to the foster parent shall revoke the order of commitment. Where the court

revokes an order committing the guardianship and custody of a child to a foster parent, it shall commit the guardianship and custody of the child to an authorized agency.

(b) A proceeding under this section may be originated by an authorized agency or by a foster parent authorized to do so pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act.

(c) Proceedings under this section shall be originated in the county in which the authorized agency has an office for the regular conduct of business or in which the child or his parent resides at the time of the initiation of the proceeding.

(d) The family court shall have exclusive, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (c) or (d) of subdivision four of this section, and the family court and surrogate's court shall have concurrent, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (a) or (b) of subdivision four.

(e) A proceeding under this section is originated by a petition on notice served upon the child's parent or parents and upon such other persons as the surrogate or judge may in his discretion prescribe. Such notice shall inform the parents and such other persons that the proceeding may result in an order freeing the child for adoption without the consent of or notice to the parents or such other persons. Such notice also shall inform the parents and such other persons of their right to the assistance of counsel, including any right they may have to have counsel assigned by the court in any case where they are financially unable to obtain counsel. The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section and section three hundred eighty-

four-c, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to the provisions of this section or of section three hundred eighty-four-c. When the proceeding is initiated in family court service of the petition and other process shall be made in accordance with the provisions of section six hundred seventeen of the family court act, and when the proceeding is initiated in surrogate's court, service shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act.

(f) In any proceeding under this section in which the surrogate's court has exercised jurisdiction, the provisions of the surrogate's court procedure act shall apply to the extent that they do not conflict with the specific provisions of this section. In any proceeding under this section in which the family court has exercised jurisdiction, the provisions of articles one, two and eleven of the family court act shall apply to the extent that they do not conflict with the specific provisions of this section. Any proceeding originated in family court upon the ground specified in paragraph (d) of subdivision four of this section shall be conducted in accordance with the provisions of part one of article six of the family court act.

(g) An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon a finding that one or more of the grounds specified in paragraphs (a), (b) or (d) or subdivision four are based upon a fair preponderance of the evidence, or upon a finding that one or more of the grounds specified in paragraph (c) of subdivision four are based upon clear and convincing proof.

(h) In any proceeding brought upon a ground set forth in paragraph (c) of subdivision four, neither the privilege

attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege; as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

(i) In a proceeding instituted by an authorized agency pursuant to the provisions of this section, proof of the likelihood that the child will be placed for adoption shall not be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency.

(j) The order and the papers upon which it was granted in a proceeding under this section shall be filed in the court, and a certified copy of such order shall also be filed in the office of the county clerk of the county in which such court is located, there to be recorded and to be inspected or examined in the same manner as a surrender instrument, pursuant to the provisions of section three hundred eighty-four of this chapter.

(k) Where the child is over fourteen years of age, the court may, in its discretion, consider the wishes of the child in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child.

4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one

or more of the following grounds:

(a) Both parents of the child are deasd, and no guardian of the person of such child has been lawfully appointed; or

(b) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, abandoned such child for the period of six months immediately prior to the initiation of the proceeding under this section; or

(c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding under this section; or

(d) the child is a permanently neglected child.

5. (a) For the purposes of this section, a child is "abandoned" by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision.

. (a) For the purposes of this section, "mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgement to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(b) For the purposes of this section, "mental retardation" means subadverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(c) The legal sufficiency of the proof in a proceeding upon the ground set forth in paragraph (c) of subdivision four of this section shall not be determined until the judge has taken the testimony of a physician and psychologist, or psychiatrist, in accordance with paragraph (e) of this subdivision.

(d) A determination or order upon a ground set forth in paragraph (c) of subdivision four shall in no way affect any other right, or constitute an adjudication of the legal status of the parent.

(e) In every proceeding upon a ground set forth in paragraph (c) of subdivision four the judge shall order the parent to be examined by, and shall take the testimony of, a physician and a certified psychologist, in the case of a parent alleged to be mentally retarded, or of a psychiatrist, in the case of a parent alleged to be mentally ill, such physician, psychologist or psychiatrist to be appointed by the court pursuant to section thirty-five of the judiciary law. The parent and the authorized agency shall have the right to

submit other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable therefor whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.

7. (a) For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such hild is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, "to plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between

the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health.

8. Nothing in this section shall be construed to terminate, upon commitment of the guardianship and custody of a child to an authorized agency or foster parent, any rights and benefits, including but not limited to rights relating to inheritance, succession, social security, insurance and wrongful death action claims, possessed by or available to the child pursuant to any other provision of law.

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY
Petitioners,

v.

BERNHARDT S. KRAMER, Commissioner
ULSTER COUNTY DEPARTMENT OF
SOCIAL SERVICES
Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Section 622 of the New York Family Court Act is unconstitutional because it permits a finding that a child has been permanently neglected based upon a "fair preponderance of the evidence."

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BERNHARDT S. KRAMER, Commissioner
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Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case centers around three children who have been in foster care most of their lives. Annie Santosky is the natural mother of all the children, Tina, John III and Jed. John Santosky is the natural father of John III and Jed. At Tina's birth, Mr. and Mrs. Santosky were 16 years old.

The circumstances which led to the foster care placement of these children would offend any reasonable person. Problems in the Santosky home first surfaced in the fall of 1973 with Tina. Although the agency technically filed a neglect petition, the underlying facts constituted child abuse. On September 10, 1973, Tina was taken to Ellenville Community Hospital where the attending physician recom-

mended hospitalization for a broken leg. However, the parents took Tina home without treatment and applied a home-made splint (E 1-2).[1] On September 23, 1973, responding to a neighbor's complaint, the police returned Tina to the hospital. The child had severe bruises on her upper arms, forehead, flank and spine as well as cuts on her upper leg (E 2). Tina was removed from her parents in November of 1973.

The Ulster County Department of Social Services began to work with the family towards the statutory goal of rehabilitation and return of the child to the parents. Although she was still technically in the custody of the agency, Tina was actually returned home on a trial basis in June of 1974 (E 134). However, any solution the agency's efforts had achieved was shortlived (E 135).

John III was removed on August 19, 1974. In addition to evidencing malnutrition to the point where he required immediate hospitalization (E 3), he had been subjected to multiple pin pricks as discipline for not sitting up in his high chair (E 5). The Department of Social Services took temporary custody of Jed three days later on the grounds that his immediate removal was necessary to avoid imminent danger. Tina, still in the agency's custody, was also removed. The underlying facts resulting in the removal of these children were never contested by Mr. and Mrs. Santosky. (E 219-221). Furthermore, at a hearing held on September 30, 1974, in which they were represented by counsel, the Santoskys allowed the agency to take custody of all their children (E 18 & 21).

The children's temporary removal mandated that the

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[1] The designation (E 1-2), refers to Respondent's Exhibit, pages 1-2. Ten copies of Respondent's Exhibits to its brief have been filed with the clerk of the Court.

agency obtain several extensions of foster care placement as time went on. For a substantial period of time, only one placement extension was contested. Moreover, the children remained in foster care without objection after July 15, 1975 although the appropriate orders had expired (E 666).

At the foster care extension hearing [2] in which the parents and the children were represented by counsel, a social worker traced the background of the case and testified that after Tina was removed, the agency offered an intensive service program from the Child Protection Unit to the Santoskys (E 34). As a result, Tina was returned home upon a private plan between the agency and the parents (E 49). As previously mentioned, John III had been born, and Annie Santosky was pregnant with Jed. Unfortunately, abuse problems resurfaced, and all the children were removed. The agency then requested that the parents attend a Mental Health Clinic, which the Santoskys agreed to do (E 37).

The Director of the Southern Ulster Mental Health Clinic testified that Mr. Santosky had serious emotional problems which rendered him incapable of raising children (E 67, 69 & 100). He also stated that his opinion had been formulated months ago and as he had not counseled Mr. Santosky since June of 1975 (E 69) the problems still remained (E 70). He also noted that when Mr. Santosky was in counseling, he attended less than half the sessions (E 78), and denied a problem existed (E 86).

In a written decision dated December 31, 1975, the court found that the Santoskys were unable to assume their parental responsibilities due to personality disorders and granted the placement extension (E 628-634). The court also directed the agency submit to the court for approval a written

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[2] The hearing was held on December 2 & 5, 1975. Counsel has been unable to locate either the transcript or the recorder's notes for the proceeding held on December 5, 1975.

plan to solve the problems at home and reunite the family (E 635-636). The agency complied with the order within thirty days (E 639-641) and the plan was approved by the court in February 1976 (E 642).

Dissatisfied with the progress of the Santoskys and concerned over the lengthy foster care status of the children, the agency moved to terminate parental rights on September 8, 1976. Since the Santoskys had never formulated a plan of their own, the case centered around what had been accomplished under the agency's plan to improve the situation which resulted in the initial child abuse.[3]

Part one of the plan proposed to develop the Santoskys' parental skills by providing a mother's aide, a nutritional aide, and a public health nurse. The Santoskys terminated the use of the mother's aide shortly after it had begun (E 305-306), and failed to attend scheduled appointments at the baby clinic (E 309). They did, however, cooperate with the nutritional aide.

Part two of the plan dealt with family planning services. Although strenuously urged, family planning had only been grudgingly considered after the February 1976 approval (E 163-164). Even after the court order, Mr. and Mrs. Santosky failed to utilize the services of Planned Parenthood of New Paltz, and consistently rejected family planning services (E 303, 392).

Parts three and four of the plan dealt with the important area of counseling. Here, the agency offered psychiatric treatment for Mr. Santosky and counseling from the Family Service Center for Mrs. Santosky. These were eventually

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[3] Although the plan was not specifically reduced to writing until January 1976, it had been in effect since the problems arose in 1973 (E 128-129, 303, 306-311) and was personally explained to the Santoskys (E 359).

combined to provide counseling from the Family Center for both. Once again, the service was considered by the Santoskys only after the court approval (E 140). Prior to the approval, Mr. Santosky had completely rejected the services of the Family Center (E 302).

It was also established that the Santoskys did not even begin to attend the Center until March 1976 (E 193), some three years after the agency had become involved with the family. Furthermore, in the period between the initial appointment and the trial, Mr. and Mrs. Santosky missed almost half of the sessions (E 194). However, the director of the center, Mrs. Elizabeth Smith, testified that they were making *movement forward* in a *positive direction* (E 212-213, 241).

The final area of the plan dealt with employment. Mr. Santosky was offered the services of a vocational rehabilitation program which he quit prior to completion (E 507) but rejoined after the February 1976 court order. Despite a poor to fair attendance record, vocational counselors testified that he was demonstrating *progress* (E 339) and *movement* (E 481).

Both parents took the stand at the hearing. Mr. Santosky testified that he understood why the children were initially removed (E 516). He also stated that he was providing more room at home for the children (E 488) and that he would like to see them come home one at a time (E 519). Mrs. Santosky testified that she understood why the children were temporarily removed (E 559, 562).

At the close of the testimony, the government argued that the Santoskys' progress was so minimal that no return was possible in the foreseeable future. Since the agency demonstrated that the children needed a permanent home quickly (E 648, 654, 660), it argued that the parental rights should be terminated. This approach was rejected. The court noted

that under New York law, the parents must be judged by standards which are reasonable under the circumstances (E 613-616). Thus, even though their efforts were minimal, they did utilize some of the services offered (E 620). With this effort,[4] they were taking steps to eliminate the initial problems, thereby planning for the future of their children under New York law. Accordingly, the petition was dismissed.

On appeal, the court found that the Santoskys' efforts constituted planning and were sufficient to thwart the agency's termination action. *See Matter of John W.*, 63 A.D. 2d 750, 751, 404 N.Y.S. 2d 717, 719 (3rd Dept. 1978).

In addition to losing its case, the agency was instructed to redouble its efforts so that the parents could achieve a minimal competency level (E 624). This was far easier said than done. Parental exposure resulted in psychological trauma to the children and the agency attempted to cut off visitation rights (E 678-681). In a decision dated June 14, 1977, the trial judge ruled that although he could not, considering the initial problems in the home, in good conscience return the children to Mr. and Mrs. Santosky (E 672), the agency must allow visitation and attempt to reunite the family, notwithstanding any problems conferred upon the children.

On October 16, 1978, Respondent filed a petition alleging that the children were permanently neglected. A trial of the issues raised in the petition was held on January 23, 26, 31 and February 1, 1979. At the hearing, all parties were represented by counsel as they must be under New York law. The court took judicial notice of its own records relating to the proceeding (J.A. 20). In so doing, the trial judge was evaluating what progress, if any, the Santoskys had

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[4] The court went so far as to call their efforts superficial (E 618).

made towards the reunification of their family. He could also evaluate agency efforts, over the course of the years, to solve the problem.

The court's opinion recites the eleven various services which the agency offered, arranged for, and encouraged the Santoskys to accept during the two years prior to trial. These services were refused (Tr. 14, 16, 18).[5] No evidence was ever submitted at trial that the parents had an alternate plan of their own. Furthermore, during the course of many contacts with social workers, the Santoskys never asked when their children would be returned home permanently (Tr. 20). The Santoskys were fully aware of the agency's services (Tr. 72), and still refused to cooperate.

The record shows, and the judge found, that all the essential services were either refused (Tr. 152) or ineffective in accomplishing the goal. The major areas of the plan were psychological counseling, aid in dealing with children and Mr. Santosky's employment difficulties. Case workers involved with the Santoskys testified that there was no forward movement (Tr. 83) in these areas.

Concerning employment, Mr. Santosky was no longer utilizing the vocational services (Tr. 40, 82) or attending classes at the adult learning center (Tr. 131); and he was still unemployed.

Due to the circumstances under which the children had to be removed, psychological counseling was an important aspect of the plan. Respondent takes strong exception to any assertions that the Santoskys participated in therapy. Rather, these services were repeatedly rejected (Tr. 29, 94). In point of fact, the last time the Santoskys engaged in psychological counseling was June of 1975 (E 69). The San-

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[5] Tr. refers to the transcript of the hearing held on January 23, 26, 31 and February 1, 1979.

toskys refused to make any efforts here, despite the fact that as of December 1977, problems still existed. A psychological evaluation of Mr. Santosky revealed frequent grossly disordered thought processes. His responses indicated an underlying psychosis against which he had few effective defenses. There was evidence of particular difficulty controlling aggressive impulses and a fear of being the victim of destructive forces which were beyond his control (E 679-681). An evaluation of Mrs. Santosky indicated a dependent personality who viewed the male figure as dominant, cruel and harmful (E 684).

The Santoskys were attending the Family Service Center. However, their attendance had fallen off (Tr. 95), to the point where they were only attending one-third of the sessions (Tr. 345). Furthermore, Mrs. Elizabeth Smith, the director of the center, is a social worker, not a psychologist (Tr. 349), and could not provide psychiatric counseling (Tr. 184).

Rather, Mrs. Smith directed her attention to helping the Santoskys deal with the eventual return of their children, perhaps the most important aspect of the plan. Therefore, she, along with the agency (Tr. 104-105), encouraged Mrs. Santosky to participate in the Child Enrichment Program; but this important service was also refused. Thus, Mrs. Smith concluded that the children could not be returned home in the foreseeable future (J.A. 16-18). Her opinion was corroborated by Dr. Sportsman, a child psychiatrist (Tr. 237-239).

In contrast to the first termination proceeding, neither of the Santoskys took the stand to testify about their plans or dreams for the return of the children.

After evaluating the evidence, the court concluded that the Santoskys had refused to plan for the future of their children although able to do so. The court noted that their

failure to utilize any of the services offered was almost total and complete (J.A. 35). It stated that their minimal efforts had tapered off to the point where they were no longer measurable (J.A. 37). Thus, the children were permanently neglected.

However, the Santoskys' parental rights were not and could not have been terminated at the fact finding hearing. Under New York law, the parents are entitled to a dispositional hearing first. At this proceeding, held on April 5, 1979,[6] Mr. and Mrs. Santosky presented no evidence that the children's best interest required a return to their home (E 694), but merely requested visitation rights (E 698).

The court promptly ordered termination.

SUMMARY OF ARGUMENT

Unless a proceeding involves a "fundamental liberty interest" the issue of burden of proof is not of constitutional moment. The concept of what constitutes a fundamental liberty interest is not expansive, but rather applies to limited, well-defined circumstances such as restraints to physical liberty. Because a proceeding to terminate parental rights does not involve a fundamental liberty interest, the New York burden of proof standard cannot be said to violate Petitioners' due process rights. Simply stated, the Court's decisions regarding family matters demonstrates that New York's choice of burden of proof standard is not in disharmony with a fundamental value determination of society.

The Fourteenth Amendment does not mandate a burden of proof greater than a preponderance of the evidence under the New York statutory scheme. The due process rights of parents are zealously protected by statute and by the N.Y. courts. The statute provides specific and readily ascertain-

[6] This proceeding, enclosed as Respondent's Exhibit 11, was transcribed at counsel's request in July 1981.

able conditions which must be met before a court can terminate parental rights. Hence there is little risk of an erroneous termination of parental rights under existing New York law. Furthermore, the interests of the child require that the preponderance of the evidence standard be applied under the New York statutory scheme.

A review of the record in the instant case demonstrates the appropriateness of the present burden of proof standard. In the alternative, the instant case need not be remanded since it is correct under any standard of proof.

ARGUMENT

I. The Fourteenth Amendment Does Not Mandate A Burden of Proof Beyond A Preponderance of the Evidence in TPR Proceedings.

The question of what burden of proof should be applied in a particular litigation involves a consideration of the substantive due process requirements of the Fourteenth Amendment. The requirement of proof beyond a preponderance is applicable only when a fundamental liberty interest is at stake. To hold otherwise would be contrary to the spirit of the decisions on the issue and create a precedent for unwarranted intrusion into legislative discretion. This result would logically follow with drastic consequences since there is no significant difference, in a burden of proof context, between the instant case and other civil litigation.

Accordingly, there is no need for an emotional distinction between this case and a condemnation action or a licensing procedure. Such a relative comparison of the interests involved is very much beside the point. The only relevant analysis in burden of proof decisions is whether the liberty interest involved is fundamental. If so, the Fourteenth Amendment addresses the issue. If not, the choice of a particular burden of proof lies within the sound discretion of a state legislature.

The Constitution does not specifically enunciate the right to raise one's children as being fundamental. However, the Fourteenth Amendment does proscribe the taking of property or liberty interests without due process of law. Since the Constitution has expressly equated these rights, it is neither necessary nor proper for the Fourteenth Amendment to be rewritten and the right to raise one's children elevated above the other property and liberty interests possessed by American citizens and safeguarded by the application of procedural due process.

There should be no doubt but that *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), heavily relied upon by Petitioners, is a procedural due process case. The issue in *Matthews* was whether a hearing was required before disability benefits were terminated. This question, of course, was answered in the affirmative.

Under *Matthews*, any time the government swings the club of state action against a citizen, the shield of the Fourteenth Amendment rises to provide a certain bundle of rights. Included in this legal package, among other rights, are notice, opportunity to be heard, and the right to cross-examine witnesses. A particular burden of proof is not included in these rights but, rather, is applicable only when a fundamental liberty interest is at stake.

A. A TPR Proceeding Does Not Interfere With A Fundamental Liberty Interest.

It should be clear from *Lassiter* v. *Department of Social Services*, 49 U.S.L.W. 4586 (1981), that, since a TPR proceeding does not concern physical freedom, a fundamental liberty interest is not at issue. *Lassiter* implicitly recognized that the right to the custody of one's children is a relatively modern legal concept resulting from an evolution of Anglo-Saxon law. Thus, considered in light of the proper historical

background,[7] the parent-child relationship is a far cry from the universal, ancient, and fundamental concept of the right to physical liberty.

In Colonial America, for pragmatic reasons, the interests of the community transcended individuals' rights in many areas. This had an interesting application to the parent-child relationship. In many respects, the community was the principal and the parent was the agent. As agents of the community, parents were given the job of raising desirable and productive citizens. This job was considered so important that it outweighed the value of family ties. If the parent fell short of the task, the child was removed from the home.[8] It was as simple as that.

Local laws were passed to ensure that the parents performed their obligations, but they varied widely depending upon the nature of the community. When the colonists formed the government and drafted the Constitution, no mention was made of the parent-child relationship. The diversity of values on the issue could not be translated into one simple due process formula to be policed by the federal government. This led to a substantial variation of state laws dealing with termination of parental rights.

The diversity of values which exists in American culture concerning the parent-child relationship is particularly relevant there. The burden of proof decisions, beginning with *In Re Winship*, 397 U.S. 358 (1970), are grounded in the universally high regard for the protection of physical liberty. Thus, no state is allowed to diverge from proving criminal guilt beyond a reasonable doubt. The entire thrust of this line of cases is to ensure uniformity, not diversity, in decid-

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[7] See Giovanni & Becerra, *Defining Child Abuse* (1979), pp. 31-75, where the evolution of the legal relationship between parents, their children, and the state is extensively discussed.

[8] *Defining Child Abuse, supra*, 38-40.

ing burden of proof questions when physical freedom is threatened. The reasoning is diametrically opposed to the Founding Fathers' attempts to allow for diversity in this area of family law.

B. Due Process Considerations May Impose A Particular Burden of Proof On The States Only When A Fundamental Liberty Interest Is At Issue.

As articulated by Justice Harlan, the choice of the standard of proof to be applied in a particular kind of litigation reflects an assessment of the comparative social disutility of the potential erroneous outcomes inherent in a proceeding. *In Re Winship*, 397 U.S. 358, 371 (1970) (J. Harlan concurring); see generally, Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977). In *Winship*, a case dealing with the burden of proof in a juvenile delinquency proceeding, two erroneous outcomes were possible: an innocent juvenile could be found guilty of the commission of a crime and incarcerated; or a guilty juvenile could be adjudged not guilty and set free. In its analysis the Court noted that the requirement for a higher degree of persuasion in criminal cases dated back to ancient times and that adherence to a reasonable double standard reflected a "profound judgment about the way in which law should be enforced and justice administrated," 397 U.S. at 361-362, quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968). Thus, the Court held that in a society where it is a fundamental value that it is far worse to convict an innocent man than to let a guilty man go free, due process of law requires proof beyond a reasonable doubt.[9]

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[9] Indeed, in our society it is practically self-evident that due process requires a more stringent standard than a preponderance of evidence in criminal proceedings. It was not until 1970 that the Court dealt with this issue "because of the nearly complete and longstanding acceptance of the reasonable doubt standard by the states," *In Re Winship*, 397 U.S. 358, 372 (1970) (J. Harlan concurring).

Similarly, in *Addington* v. *Texas*, 441 U.S. 418 (1979), the Court held that the Due Process Clause of the Fourteenth Amendment requires proof greater than a preponderance of the evidence standard in a civil commitment proceeding. In *Addington*, the Court assessed "the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof," 441 U.S. at 455. In effect, such an assessment is nothing more than Justice Harlan's assessment of the comparative social disutility of potential erroneous outcomes. The Court weighed the disutility of erroneously committing an individual to a mental institution for an indefinite period against the social disutility of not committing those who require treatment. Although there is an extensive social disutility in not committing and treating those mentally ill individuals who should be so committed, the Court found that this possible outcome is greatly outweighed by the individual's fundamental interest in his own liberty. 441 U.S. at 425-427. Hence, the preponderance of evidence standard in a civil commitment proceeding does not satisfy the requirements of due process.

At this juncture, it is important to note that the liberty interest at stake in *Winship* and *Addington* was the fundamental right to remain free in society. When the individual faces wrongful loss of liberty through an erroneous criminal conviction or civil commitment, the Court has ruled that the burden of proof becomes an issue of constitutional moment. Admittedly, other liberty interests have been recognized by the Court as having procedural due process implications. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (privacy). Nevertheless, although confronted with the issue in several different settings, the Court has never ruled that any liberty interest other than the physical liberty of remain-

ing free in society requires a burden of proof greater than a preponderance of the evidence as a matter of the Due Process Clause.

The immigration decisions are not to the contrary. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966), cited by Petitioners, was not a constitutional ruling but rather was a case where the Court was required to "read" a burden of proof standard into a deportation statute in light of Congressional silence.[10] The Court did not proceed to rule on the merits of the case until it analyzed the relevant statute and determined that Congress had "not addressed itself to the question of what degree of proof is required in deportation proceedings." 385 U.S. at 276.

Furthermore, the immigration decisions are in accord with the principle that the burden of proof is not a constitutional issue unless physical liberty is at stake. In *Woodby* (deportation) and *Schneiderman* v. *United States*, 320 U.S. 118 (1943) (denaturalization), the potential deprivation was the right to physically remain in the United States, obviously constituting a fundamental liberty. Thus, the Court preferred a burden of proof higher than a preponderance of the evidence. These cases are in contradistinction to *Vance* v. *Terrazas*, 444 U.S. 252 (1980) (expatriation) where the individual could, if the government was successful, still remain physically free in society, notwithstanding the loss of citizenship.

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[10] Similarly, in *Fedorenko* v. *United States*, 101 S.Ct. 737 (1981), a case cited by *Amicus Curiae*, the Court did not render a ruling of constitutional dimension nor even a decision involving burden of proof. Rather, the Court resolved, as a matter of statutory interpretation, the issue of whether an immigrant's failure to disclose in his application for a visa that he had served as an armed guard for the Nazis in Poland, rendered his citizenship revocable as "illegally procured" pursuant to statute. The issue of burden of proof was not before the Court.

Thus, where the Court agreed that the frequency of incorrect denial of welfare benefits could be high and the state's interest in screening out fraudulent welfare claims was relatively low, the Court nonetheless held that the Fourteenth Amendment did not compel altering of the state created burden of persuasion which fell upon the welfare claimants. *Lavine* v. *Milne*, 424 U.S. 577 (1976). The Court noted that "outside the criminal law area, where special concerns attend, the focus of the burden of persuasion is normally not an issue of federal constitutional moment." 424 U.S. at 585. As a result, the Court deferred to New York's legislative determination concerning the burden of persuasion.

Similarly, the Court has refused to adopt, as a matter of constitutional law, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the guilt of an accused. *Patterson* v. *New York*, 432 U.S. 197, 210 (1977). In so ruling the Court recognized that it is normally:

> within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

432 U.S. at 201-202, quoting in part *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958).

In *Patterson*, the New York Legislature had weighed the social disutility of two erroneous outcomes: persons deserving treatment as murderers might escape punishment; conversely, individuals who should justly escape punishment, as a result of an affirmative defense, might be wrongly con-

victed. The Legislature, in making the determination that the former erroneous outcome outweighed the latter outcome, was required to subtly balance society's interests against those of the accused. The Court was unwilling to overturn such legislative decision-making. 432 U.S. 207-210.[11]

Nor did the Court strike down a preponderance of the evidence standard where the right affected by a possible erroneous determination was one of the most cherished rights possessed by a citizen, namely citizenship itself. In *Vance* v. *Terrazas*, 444 U.S. 252 (1980), the Court held that Congress did not exceed its constitutional authority by requiring proof of an intentional expatriating act by only a preponderance of the evidence. Although the Court, in analyzing relevant precedent, recognized its preference for requiring clear and convincing evidence to prove expatriation, it ruled that expatriation proceedings do not threaten a loss of liberty as in the criminal and involuntary commitment cases. 444 U.S. at 266. Accordingly, the Court deferred to the Congressional judgment that the preponderance standard of proof sufficiently protects the interest of the individual in retaining his citizenship.

In the instant case, one not involving the potential loss of physical liberty, the two potential erroneous outcomes can be stated as follows: the state may erroneously fail to terminate the relationship between a parent and a permanently neglected child, or the state may incorrectly terminate

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[11] Additionally, the Court did not accept the argument that the New York statute was somehow unconstitutional because the majority of states have now assumed the burden of disproving affirmative defenses, *Patterson* v. *New York*, 432 U.S. 197, 211 (1977). In the instant case, Petitioners point out that only twelve states utilize the preponderance of evidence standard in proceedings to permanently terminate parental rights. This "polling" of states is totally irrelevant to a consideration of whether Petitioners' due process rights have been violated. *See Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973).

a parent-child relationship. As discussed below, an assessment of the comparative social disutility of these outcomes does not result in a fundamental value determination, one rooted in the tradition and conscience of our society; as a matter of due process of law the burden of proof in a proceeding to terminate parental rights must be greater than a preponderance of the evidence. Therefore, the Court should defer to the standard of proof choice made by the New York Legislature.

C. The Court's Decisions Regarding Family Matters Do Not Compel The Conclusion That New York's Choice of Burden of Proof Standard Is In Disharmony With A Fundamental Value Determination of Society.

The fundamental value at stake in *Winship* and *Addington* was readily discernible. The Court in these two cases could state with certainty that the individual's interest in his liberty is so precious in our society that he cannot be incarcerated or committed to a mental institution without proof greater than a preponderance of the evidence of his guilt or mental illness. In contrast, as is apparent from the Court's decisions in the area of family law, it cannot be concluded that fundamental values of society dictate that, as a matter of due process of law, parental rights cannot be terminated without proof greater than a preponderance of the evidence of permanent neglect. *Cf., Lassiter* v. *Department of Social Services*, 49 U.S.L.W. 4586 (1981) (The Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding).

The Court has long held that the state has a wide range of power for limiting parental freedom and authority in matters affecting a child's welfare. *E.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944). Certain cases, such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) may be

readily cited for the proposition that freedom to raise one's children without unnecessary state intrusion is protected by the Due Process Clause of the Fourteenth Amendment. But these cases are clearly distinguishable from the case now before the Court because they are not cases involving a consideration of potential harm to the child. See *Wisconsin* v. *Yoder*, 406 U.S. at 230.[12] As stated by the Court:

> To be sure, the power of the parent, . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

406 U.S. at 233-234.

But, as discussed below, the instant case involves complicated, controversial, and subtle balancing of the interests of the child as well as those of the parent and state. Where the interests and well being of the children are at stake, so-called fundamental values frequently become blurred. Compare *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) (individual has right to be free from unwarranted government intrusion as to decision whether to bear or beget children) with *Quilloin* v. *Walcott*, 434 U.S. 247 (1978) (state may deny unwed father's authority to prevent adoption of his illegitimate child where father's interests are balanced by the interests of all parties concerned including the interests of the child).

In summary, the general rule emerging from the relevant cases is that the question of the proper burden of proof is a matter of state law unless physical freedom is at stake.

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[12] In *Yoder*, the Court limited its holding that Amish parents may not be criminally prosecuted for failing to send their children to school beyond the eighth grade, by its assertion that the case was not one in which any harm to the child was demonstrated or properly inferred. 406 U.S. at 230.

The Court's decisions in the family law area do not create an exception to the rule.[13]

Therefore, the writ of certiorari was improvidently granted.

D. At The Very Least, The New York Legislature's Burden of Proof Determination Must Be Allowed To Stand In The Absence of Overwhelming Evidence Of Fundamental Fairness Violations.

This Court has enunciated the principle that it does not sit as a super-legislature to determine the wisdom of laws pertaining to economic and social problems. *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). Since the Legislature has considered the burden of proof question, a presumption must arise that the decision is sound. *Lockport* v. *Citizens For Community Action*, 430 U.S. 259, 272-273 (1977).

Another presumption arises from *Lassiter*. At the time of the decision, a preponderance of the evidence was the standard for the termination of parental rights in North Carolina and, of course, counsel was not provided. Under New York law, *both* the parent and the child are entitled to a lawyer at a TPR proceeding. If litigating without counsel under a preponderance standard does not offend fundamental fairness, then certainly a hearing conducted under the same standard with counsel provided for all parties must also pass constitutional muster in the absence of blatant due process violations. There should be no question but that no such unfairness, or any unfairness, exists under the New York statutory scheme.

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[13] Furthermore, no decision of this Court has used the burden of proof as a cure-all for a statute which Petitioners and particularly *Amicus Curiae* half-heartedly argue is void for vagueness.

II. The Fourteenth Amendment Does Not Mandate A Burden of Proof Beyond A Preponderance of The Evidence Under The New York Statutory Scheme.

It is important to state at the outset what the New York statute does not do. It does not sacrifice or mitigate the rights of parents for what it perceives to be the "greater good" of children's rights. The Family Court Act is a carefully considered attempt to deal with child abuse and neglect problems in the jurisdiction.[14]

The law is based on the principle that the natural family must remain intact at all possible costs. Therefore, the most important presumption of the statute is that every home situation, no matter how neglectful or even dangerous, can be rectified. All people must do is try. If a parent in New York merely progresses toward the eventual solution of the family's problem, no rights can be lost.

However, the law also comes to grips with the realities of an imperfect world. The drafter knew, economic and social conditions being what they are, and human nature being what it is, that situations would be encountered wherein no resolution was possible. In these cases, where the parents cannot be helped, procedures were developed so that government could take steps to provide a stable home for the children involved.

The purpose of the permanent neglect statute is not punitive, even though a neglectful parent may suffer. The statute

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[14] Since the statute serves a legitimate state function in curing a social problem, we reject Petitioners' suggestion that it evidences a cultural or racial bias. A law is not unconstitutional solely because it has a racially disproportionate impact. *Washington* v. *Davis*, 426 U.S. 229, 238 (1976). Here any imbalance arises not from an intent to discriminate, but rather from the problems which poverty creates for families. See *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 833 (1977). As Petitioners have failed to show any intent to discriminate in a law which is neutral on its face, their constitutional challenge must also fail.

is remedial in nature, first and foremost to the family, and then to the child. It is designed to rescue children from the uncertainty of being legally chained to individuals who give little hope of ever acting as parents. *Matter of Barbara P.*, 71 Misc. 2d 965, 337 N.Y.S. 2d 203 (Fam.Ct.N.Y. County 1972).

Thus, the instant case cannot be decided in the vacuum of an academic discussion of the burden of proof at a permanent neglect fact finding hearing. Rather, the risk of an erroneous termination must be evaluated under all the available statutory safeguards.

A. The Due Process Rights of The Parents Are Zealously Protected By Statute And By The Courts.

The substantive and procedural law of New York concerning the permanent termination of parental rights must be deemed fundamentally fair. See Gordon, *Terminal Placement of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 St. Johns L. Rev. 215 (1971) (hereinafter *Termination of Parental Rights*). The law provides specific and stringent conditions which must be met before a court may permanently terminate the rights of the parent. Furthermore, an objective reading of the relevant case law reveals that the statute is narrowly construed by the courts. E.g., *Matter of Anita P.P.*, 65 A.D. 2d 18, 410 N.Y.S. 2d 916 (3rd Dept. 1978); *Matter of Carl and Annette N.*, 91 Misc. 2d 738, 398 N.Y.S. 2d 613 (Fam. Ct. Schenectady 1977). Indeed, in seeking to terminate parental rights, the State bears a heavy burden; only extraordinary circumstances will permit termination. *Corey L.* v. *Martin L.*, 45 N.Y. 2d 383, 408 N.Y.S. 2d 439, 380 N.E. 2d 266 (1978).

Contrary to the assertions of Petitioners and *Amicus Curiae*, the court may not apply its own subjective standards in its adjudication of parental rights. *Matter of Sanjivini K.*,

47 N.Y. 2d 374, 418 N.Y.S. 2d 339, 391 N.E. 2d 1317 (1979). The court's prime inquiry in a termination proceeding does not involve a subjective "best interest" test. *Matter of Female W.*, 47 N.Y. 2d 861, 419 N.Y.S. 2d 65, 392 N.E. 2d 1247 (1979). The court is simply not free to compare the relative benefits offered a child as a result of termination. *Matter of Leon R.R.*, 48 N.Y. 2d 117, 421 N.Y.S. 2d 863, 397 N.E. 2d 374 (1979). Rather, the court must determine whether the many conditions required by the State Legislature have been fulfilled, before it may permanently sever the parent-child relationship. These many conditions assure a fundamentally fair adjudication.

1. The Child Must Have Been Previously In The Care of An Authorized Agency.

The court has jurisdiction only over those children who have previously been removed from the home on a temporary basis. Fam. Ct. Act. § 614, 1(c). A child may be voluntarily surrendered to the temporary custody of the State. In other circumstances, the child is not placed in the care of the State until there has been a judicial adjudication that the child has been abused or neglected.[15] Fam. Ct. Act. § 1011, et seq. The parent in such a proceeding is entitled to counsel, a full hearing and a determination based upon the record and a preponderance of the evidence. *Matter of Michael B.*, 60 A.D. 2d 628, 400 N.Y.S. 2d 169 (2nd Dept. 1977). Additionally, the parent has a right of appeal follow-

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[15] An "abused child" is defined as a child whose parent has physically injured the child and the injury creates a substantial risk of death, disfigurement, impairment of physical health, or loss of organ functions. Fam. Ct. Act. § 1012e. Sexual offenses against the child are also covered by this category. *Id.* A "neglected child" is one whose physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as a result of the parents' failure to exercise a minimum degree of care. Fam. Ct. Act. § 1012f. Failure to provide food, clothing, shelter or abandonment of the child among other causes, could constitute neglect. *Id.*

ing a court finding of abuse or neglect. Fam. Ct. Act. § 1111.

But no matter how egregious the harm to the child by the parent, the State may not permanently terminate parental rights on the basis of abuse or neglect.[16] Despite such findings, New York continues to presume that the child's need for a normal family life will best be met in the home of the natural parent. Social Services Law § 384-b, 1 (a)(ii). Thus, the court in a termination proceeding is not primarily concerned with the parental conduct which resulted in the child's removal from the home. Instead, the court must assess the efforts of the parents as well as the State to reunite the family.

It is only this assessment that may trigger a finding of permanent neglect which in turn may lead to permanent termination of parental rights.[17] Social Services Law § 384-b, 7(a).

2. The Parent Must Fail To Maintain Contact With The Child Or Fail To Plan For The Future of The Child, Although Physically And Financially Able To Do So.

The statute places an affirmative duty upon a parent to maintain "substantial," "continuous" or "repeated" contact with a child in the care of an authorized agency. Social Services Law § 384-b, 7(a). This provision has generally been applied by the courts to terminate rights in extreme circumstances. Thus, where a mother fled to Virginia in order to avoid arrest and contacted her children twice by

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[16] In contrast many states permit termination solely upon a finding of abuse or neglect. *E.g.*, Ariz. Rev. Stat. § 8-533.

[17] Four grounds actually exist for the permanent termination of parental rights: (1) both parents are deceased (2) the child has been abandoned (3) the parents by reason of mental illness or retardation are unable to provide adequate care for the child (4) the child has been permanently neglected. Social Services Law § 384-b, 4(a), (b), (c) and (d).

telephone during a seventeen month period while a fugitive, the court held that she had failed to maintain substantial contact. *Matter of Melanie Ruth J.J.*, 76 A.D. 1008, 429 N.Y.S. 2d 773 (3rd Dept. 1980). In contrast, where a mother's failure to reach her children was explained by the great distance and expense involved in a trip from her residence in California to New York and where the mother had maintained frequent contact with her children by mail and telephone, the court held that the requirement of contact had been satisfied. *Matter of Tina X.X.*, 73 A.D. 2d 1013, 414 N.Y.S. 2d 53 (3rd Dept. 1980). Furthermore, a parent who is physically or financially unable to contact her child is excused from this provision. *Matter of Wayne T.D.*, 70 A.D. 2d 617, 416 N.Y.S. 2d 318 (2d Dept. 1979); *Matter of James S.*, 98 Misc. 2d 650, 414 N.Y.S. 2d 477, (Fam. Ct. Monroe County 1979).

Moreover, § 384-b, 7(a) requires the parent to plan for the future of the child. This mandate presupposes that parents take steps to correct the conditions that led to the removal of the child from their home. *Matter of Leon R.R., supra*. Once again, the court is not permitted to apply its own subjective values in evaluating the efforts of parents to formulate a plan for the future of their children. Standards to evaluate the adequacy of a plan must not be set unrealistically high, but must take into consideration the financial and social circumstances of the parent. *Matter of Orlando F.*, 40 N.Y. 2d 103, 386 N.Y.S. 2d 64, 351 N.E. 2d 711 (1976).[18] As a result the failure to plan provision is applied narrowly; doubts concerning the failure to plan are resolved in favor of the parent. *See Matter of Santosky*, 89 Misc. 2d 730, 393 N.Y.S. 2d 486 (Fam. Ct. Ulster County 1977).

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[18] The brief of Community Action for Legal Services, Inc. declares that Family Courts in New York have "refused" to follow *Orlando F.* (*Amicus Curiae* Brief at 11). The cases cited for this proposition were all decided before *Orlando F.*

In *Matter of Anita P.P., supra,* for example, the court fully recognized that if a parent found alternate employment with fewer working hours, utilized a day care program, and engaged a housekeeper, many of the problems which caused the removal of the child from the home would be cured. Nonetheless, the court found that it would not be realistic to hold the parent to such a plan because he was a baker by trade who was required to work long night hours and was also heavily in debt.

It is important to note that parents are not required to fulfill their plans or achieve any goal. The statute speaks strictly in terms of planning; it imposes no requirements of accomplishment.[19] As previously stated, the parent merely must seek to take measures that will correct the condition that caused the removal of the child from the home. This requirement has been inaccurately characterized by Petitioners as being vague and subjective. Actually, a parent's obligations under the Act are readily identified and evaluated. A typical case illustrates this point.

In *Matter of James S., supra,* a father's chronic alcoholism prevented unification of his family. Nonetheless, he steadfastly refused to take any steps to alleviate his problem with alcohol. A realistic attempt by the parent to plan for the future of his children could be identified by the court without resort to vague or subjective standards. Succinctly stated, the court identified the underlying problem confronting the family, in that case the father's alcoholism, and then ascertained whether the father was making any effort to address the problem. Since the parent refused to undertake

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[19] Not all jurisdictions are as generous. In Oklahoma, for example, following an adjudication that a child is "deprived," a parent, wishing to avoid permanent loss of parental rights, must correct within three months the conditions which led to the finding of deprivation. Okla. Stat. Title 10 § 1130.

any treatment, thereby refusing to plan for the future of his children, the court was compelled to order that his parental rights be terminated.

Nor can the planning requirement be considered unduly burdensome upon needy and destitute parents. No parent is required to undertake any planning unless he or she is physically and financially able to do so. Social Services Law § 384-b, 7. Thus, an individual living on sixty dollars a month income, housed in an abandoned school bus and recently released from jail was totally excused from planning for the future of his children because he was financially unable to do so. *Matter of Thomas T. T.*, 67 A.D.2d 788, 412 N.Y.S.2d 482 (3rd Dept. 1979).

3. The Social Service Agency Must Undertake Diligent Efforts To Strengthen The Parental Relationship.

Parents who face the permanent loss of their children are not expected to solve their problems without assistance. Embodied in § 384-b is the legislative judgment that society should not permanently terminate parental rights unless it has first tried to reestablish the parent-child relationship. As a result, the statute requires that a social agency, in whose care a child is placed, must make "diligent efforts to encourage and strengthen the parental relationship." Social Service Law § 384-b, 7. The duty of the agency pursuant to the statute is clear; the agency must help the parent alleviate the predicament that caused the removal of the child from the home. *E.g., Guardianship of Denlow*, 87 Misc.2d 410, 384 N.Y.S.2d 621 (Fam. Ct. Kings County 1976). The efforts expected of the agency include the investigation of financial problems of the parent, the formulation of viable proposals, suggestions as to the development of a plan for service, informing the parent as to the child's progress, as well as arrangements for visitation. Social Services Law § 387-b, 7(f); *Matter of Suzanne N.Y.*, 102 Misc.2d 215,

423 N.Y.S.2d 394 (Fam. Ct. N.Y. County 1979); See *Matter of Anita P.P., supra.*

Accordingly, where a father's problems were a lack of a job and stable home as well as a periodic drinking problem, it behooved the agency to aid the parent in his search for a job and housing and to recommend a suitable alcohol treatment program. *Matter of Florence X.*, 75 A.D.2d 942, 428 N.Y.S.2d 80 (3rd Dept. 1980); *Accord, Matter of Thomas T. T., supra.* Normally, if the agency fails in its duty to assist the parents, parental rights may not be permanently terminated. *E.g., Matter of Leon R. R., supra; See* also, *Matter of Mark G. G.*, 69 A.D.2d 311, 419 N.Y.S.2d 275 (3rd Dept. 1979).

Admittedly, the agency is excused from exercising diligent efforts to encourage and strengthen the family relationship when such efforts would be detrimental to the child. Social Services Law § 384-b(7). But this provision has not been expansively applied. Generally, agencies are not permitted to invoke this provision unless there is great potential for physical or emotional harm to the child. *See* 18 N.Y.C. R.R. 431.9(b)(2); *Matter of Florence X., supra.* Thus, an agency could discontinue its efforts to reunite a mother with her children, where the mother was a drug addict and was involved in a bizarre sexual crime when she and another woman "rolled" an elderly man in the mother's apartment. *Matter of Terry D.*, 53 A.D. 957, 385 N.Y.S.2d 844 (3rd Dept. 1976). However, an agency decidedly cannot fail to fulfill its statutory duty merely because it would be difficult or burdensome for the agency to undertake efforts to assist the family due to the parent's predicament. *E.g., Matter of Anita P.P., supra; Compare Matter of Shantal M. K.*, 68 A.D.2d 482, 417 N.Y.S.2d 696 (1st Dept. 1979) (diligent efforts not necessary where record reveals great potential for physical abuse) *with Matter of Suzanne N. Y., supra*

(agency must assist mother, no matter how dire her financial circumstances).

4. A Parent Must Fail In His Or Her Responsibilities For At Least One Year Following Removal of The Child From The Home.

Parental rights cannot be terminated in New York without ample demonstration of parental unfitness. A parent must fail to contact or plan for a child's future for a period of more than one year.[20] Social Services Law § 384-b(7). This requirement provides a parent with a fair opportunity to take steps to reunite the family, once a child has been removed from the home and placed in the custody of a social agency.[21] The requirement also has the salutary effect of providing a lengthy record for the court to consider, thereby reducing the chance of an erroneous determination.

5. The Permanent Termination of Parental Rights Must Be In The Best Interests of The Child.

As previously discussed, the New York statutory scheme for terminating parental rights gives every benefit of doubt to the parent. If at all possible, the State would prefer, indeed considers it socially desirable, for the family unit to remain intact. Consequently, not even a finding of permanent neglect will automatically trigger the permanent termination of parental rights. *See In Re Roy Anthony A.*, 59 A.D.2d 662, 398 N.Y.S.2d 277 (1st Dept. 1977). Following an adjudication in a "fact-finding" hearing of permanent neglect, the court must hold a separate "dispositional hearing"

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[20] In such states as Iowa, this period is as little as six months. Iowa Code § 232.116.

[21] *Amicus Curiae* correctly points out that the one year period need not be the year immediately preceding the filing of a petition for termination. However, any potential for harshness or unfairness resulting from this interpretation of the one year period is greatly reduced by the requirement of a "dispositional hearing" following a finding of permanent neglect. See discussion "5," *infra*.

to determine whether permanent termination of parental rights is in the best interests of the child. Fam.Ct. Act §§ 623, 631. An adjudication of the child's best interests must be based solely upon the separate record of the dispositional hearing and a preponderance of the evidence.[22] *See In Re "Female" M.*, 70 A.D.2d 812, 417 N.Y.S.2d 482 (1st Dept. 1979).

The dispositional hearing helps assure that parental rights will not be terminated if it is at all possible to reunite the family. The hearing works to preserve the rights of those parents whose conduct has improved subsequent to the failure to maintain contact or plan for the future of the child.[23] See *Termination of Parental Rights, supra*, at 248.

6. The Record Developed During The Fact Finding And Dispositional Hearings Must Enable The Court To Render A Fundamentally Fair Adjudication.

By statutory mandate, courts are only permitted to admit material and relevant evidence at the fact finding and dispositional hearings. Fam.Ct.Act § 624. Furthermore, social service case worker reports, which are often a significant part of the record, must be comprehensive, factual, and objective. Social Service Law § 372; 18 N.Y.C. R.R. 428, *et seq*. Entries in these reports must be based upon the first-hand knowledge of the case worker and recorded shortly after the occurrence upon which they are based. *Matter of Leon R.R., supra.*

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[22] Parents are entitled to counsel at this and every stage of the termination proceedings. Fam.Ct.Act § 262. The children are also entitled to an attorney at the termination proceeding. *See Matter of Orlando F., supra.*

[23] Thus, it is not unfair or harsh that the one year period of failure to plan and contact may not immediately precede the filing of a petition for termination. In such cases the parent may demonstrate at the dispositional hearing that his or her conduct has improved subsequent to the one year period.

It is improper for a case worker to base his allegation of parental misconduct entirely upon hearsay.[24] *E.g., Matter of Thomas T. T., supra.* Mere suspicion or rumor of parental misconduct must be excised from the case worker's file. *Matter of Leon R. R., supra; Matter of Lisa Ann U.*, 75 A.D.2d 944, 427 N.Y.S.2d 994 (3rd Dept. 1980) (anonymous and vindictive letters must be removed from file). The evidence presented against the parents cannot be conclusory but rather must be specific and detailed. *See Matter of Anita P.P., supra* at 919. Such evidence greatly diminishes the chance of an erroneous outcome and permits the court to render a fundamentally fair determination.

B. The Interests of The Children Require That The Preponderance of The Evidence Standard Be Applied In TPR Proceedings Under New York Law.

At stake in a TPR proceeding are several interests which distinguish it from other litigation requiring an upgraded burden of proof. In a criminal or involuntary commitment proceeding, the state is acting solely in a punitive fashion. Here the state action is protective of the child's interest.

However, the law itself makes no presumption that the state is acting on the child's behalf. In all TPR cases, the child is entitled to be represented by an attorney. *See Matter of Orlando F., supra.* The child's law guardian submits a report and recommendations to the Family Court and is free to argue against termination. Also, the law makes no presumption that the state is acting in the child's interest by seeking termination since a dispositional hearing is required after the permanent neglect finding. There is no presumption at this hearing that the child should be permanently removed from his natural parents. Family Ct. Act. § 631(c).

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[24] The case file in its entirety cannot even be introduced at the hearing unless counsel for the parents has been given adequate opportunity to examine its contents in order to prepare for cross-examination and rebuttal. *E.g., Matter of Florence X., supra.*

No one, of course, can be sure how judges will apply any new standard of proof. It is conceivable that a higher standard would reduce the number of terminations, resulting in increased foster care costs. However, any monetary costs are miniscule compared to the real harm. That is, since parental rights are already so well protected, it would be a denial of due process to the children involved in the litigation, if a termination was any more difficult to obtain under New York law.[25]

1. Raising The Burden of Proof Would Interfere With The Child's Right To Proper Custody.

The parental prerogative and family autonomy are premised upon the parents' assumed superior capacity to care for the child and act in the child's best interests. Parents' control over their children, however, is not absolute. "In our society, parental rights are limited by the legitimate rights and interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 630 (1979).

Children themselves possess certain rights and interests that may be in conflict with those of their parents. In addition, the state has an interest in the well-being of the child that may also be in conflict with the p arents' interests. This state interest is evidenced in the variety of statutes that authorize state intervention on behalf of neglected or abused children.

In addition, it has been decided that a child has a substantial liberty interest in not being confined unnecessarily for medical treatment. *Parham* v. *J.R.*, 442 U.S. 584

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[25] The child's interest in a TPR proceeding was not discussed in the *Lassiter* decision. However, the issue in *Lassiter* was whether the lack of counsel at a TPR proceeding would render the relative strength of the parties so unequal as to violate fundamental fairness. Since under New York law, a TPR proceeding is already a contest of equal interests, the consideration here is by what standard should that equal contest be judged. Thus, the child's interest must be considered.

(1979). Thus, it is evident that minors, as well as adults, are protected by the Constitution and possess constitutional rights.

It has been argued that among the fundamental rights of children is the right to custody.

> Juveniles have particular and peculiar rights and they require particular and peculiar treatment. The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.

Shears, *Legal Problems Peculiar to Children's Courts,* 48 ABAJ 719, 720 (1962).

The right of a child to proper custody implies the right of a child to a permanent home and a stable environment. If the child cannot be afforded proper custody with his natural parents, then he should and must be established with a legal guardian or family that can provide him with permanence.

Experts in the child welfare field have repeatedly documented the need of every child for the unbroken continuity of a loving and enriching relationship with an adult. A child needs stability in order to develop his own identity as well as interpersonal relationships with others. See Weinstein, *The Self-Image of the Foster Child* (1960).

It is also this permanence or proper custody that enables a child to develop into a responsible citizen of society. "The well-being of its children is of course a subject within the state's constitutional power to regulate. . . ." *Ginsberg* v. *New York,* 390 U.S. 629, 639 (1968). Consequently, the State "is not without constitutional control over parental discretion in dealing with children when their physical or

mental health is jeopardized. *Parham* v. *J.R.*, 442 U.S. at 603.

In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court also granted the State control over and above parental discretion. The main issue in *Ginsberg* involved the constitutionality of a New York criminal statute. The statute prohibited the sale of material defined to be obscene to minors. Obscene material was defined on the basis of its appeal to the minors, not by whether or not it would be obscene to adults. The Supreme Court, in a decision upholding the statute as valid, stated:

> While the supervision of children's reading may best be left to their parents, the k..owledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.

Id. at 640.

Constitutional law cases have not only revealed the State's right to supercede the parental prerogative in certain instances, but have also established the State's interest in protecting the welfare of children, oftentimes at the expense of the natural parents.

> . . .[B]asic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end. . . . It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.

Prince v. *Massachusetts*, 321 U.S. 158, 165 (1944).

It is this concept that the phrase "right to proper custody"

encompasses. The State's interest in the well-being of children establishes its interest in assuring that the child is afforded his "right to proper custody." The juvenile court was designed to provide children with rights to proper upbringing and to intervene when parents could or would not discharge that function. Teitelbaum, *Foreword: The Meanings of Rights of Children,* 10 N.M.L. Rev. 235, 246 (1980). If a child's parents default in effectively performing their custodial function, the State, as *parens patriae,* may intervene. *See In Re Gault,* 387 U.S. 1 (1967).

A child's well-being inherently bespeaks of a right to proper custody, *i.e.,* an opportunity to grow into a free and independent person as a result of *permanence* in home and environment. The State, as *parens patriae,* has an interest and a duty, in promoting the development of minors into responsible members of society, to assure each child is afforded his right to proper custody. Raising the burden of proof would make it unnecessarily difficult for the State to accomplish its duty.

2. The Interests of The Parent Are Mitigated At The TPR Proceeding Since They Possess Only A Biological Relationship With The Child.

In *Parham* v. *J.R.,* 442 U.S. 584 (1979) the Court noted that since a family is a cohesive unit the parents are presumed to be acting in the best interests of their children. "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this." 442 U.S. 584, 602.

Parental rights do not arise merely from the biological

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[28] It has even been suggested that a biological relationship alone is not sufficient to create a constitutionally protected family. *Moore* v. *East Cleveland,* 431 U.S. 494, 534-535 (1977) (J. Stewart dissenting), 549, (J. White dissenting).

connection between parent and child.[26] *Caban* v. *Mohammed*, 441 U.S. 380, 397 (1979) (J. Stewart dissenting). Rather, the importance of the familial relationship stems from the emotional attachments that derive from the intimacy of daily association. *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 844 (1977).

At the final termination proceeding under New York law, the parent has been deprived of the custody of his child for at least, and in most cases longer than, one year. The deprivation of custody arose from the initial circumstances of abuse and neglect. Since the parent, through his actions, has forfeited a significant portion of his liberty interest, the rights of the child must be taken into consideration.

In New York State the Legislature has taken these rights into consideration, balanced the competing interests and decided upon the preponderance of the evidence standard. Other legislative bodies are free to balance the interests and come to different conclusions. Congress did exactly that concerning the termination of the rights of Indian parents. 25 USC § 1912.[27]

Therefore, a higher standard is permissible but not constitutionally mandated.

C. There Is Little Risk of An Erroneous Termination of Parental Rights Under Existing New York Law.

The New York statute is fundamentally fair due to the procedural and substantive elements which it contains. Perhaps the most important aspects is that parental rights cannot be terminated at the initial proceeding.[28] Thus, if a

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[27] The purpose of the Act is to promote the stability and security of Indian tribes and families to preserve the *unique* values of Indian culture. See Indian Child Welfare Act 1978, U.S. Code Cong. and Ad News 7530.

[28] The bifurcation of proceedings distinguishes New York from other preponderance jurisdictions which allow a termination at the

sions prior to the filing of a permanent neglect petition. Generally, more than one extension of placement is sought before a permanent neglect petition is filed. Such a procedure guarantees fundamental fairness.

The substantive elements of the statute are also sound.[29] It is possible to prove that a parent is dead or has abandoned his children based upon readily ascertainable facts. When the state seeks to prove that an individual cannot care for his children due to a mental illness, the parent is given the protection of the clear and convincing evidentiary standard. If the agency seeks to terminate rights based upon failure to plan or maintain contact, the parent can defeat the government's action by showing some progress in one year.

Furthermore, the concept of planning gives the trial judge flexibility to evaluate each case on an individual basis. Authorities agree that statutes in this area need to be flexible. See, *Defining Child Abuse, supra* at 9. At the same time the law eliminates subjectivity by giving the judge a yardstick of one year. The trial judge can evaluate the testimony and determine if any progress has been made in one year. If there is no progress the judge need not make a subjective value judgment concerning whether the family can be reunited in the foreseeable future. He need only apply the law and presume that the child is permanently neglected.

Since the law is procedurally and substantively sound we

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[29] It is important to note that the approach taken by New York on terminating parental rights compares favorably with proposed model acts. Contact and planning requirements on the part of the parent are included in several model acts. *See* Institute of Judicial Administration/American Bar Association, Standards Relating to Abuse and Neglect, Part VIII (Tentative Draft 1977); Health and Human Services State Adoption Act (1980); Model Dissolution of Parent-Child Relationship Act (1976). These model acts also require efforts by the State to reunify the family. In contrast to the New York statute, the ABA tentative draft permits in certain cases termination at the initial dispositional hearing.

parent works to eliminate problems at home, his parental rights cannot be lost. Another important safeguard is the periodic review of foster care placement. Fam. Ct. Act § 392. At this proceeding a parent has the right to challenge an extension of foster care placement. Studies indicate that such a review system accelerates the placement of children into permanent and stable homes. See *Children Without Homes*, Children's Defense Fund (1978), 161.

Also, a parent who feels aggrieved by agency action need not wait until the expiration of the original placement order. Under Fam. Ct. Act § 1062 a parent can petition the court at any time for an order terminating placement. Under § 1064, the issues at such a hearing is whether continual foster care will serve its intended objective.

Moreover, even if the child was found to be permanently neglected, the parent is entitled to a dispositional hearing. Here, he can show that notwithstanding past actions, the home situation has progressed to the point where the child can be returned home. Both the parents and children are represented by counsel at all stages of the termination proceeding.

To summarize, the government must be able to prove a failure to plan or maintain contact for a *continuous* period of one year after the child has been placed. Since initial placements are limited to a maximum of 18 months after a finding of neglect or abuse, the agency generally will have to petition the court (on notice to the parent) to have placement extended. Therefore, the parents more than likely will have appeared in court, with attorneys, on at least two occa-

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initial hearing. See Ariz. Rev. Stat. Ann. § 8-533, 13 Del. Code § 1103(4), Idaho Code § 16-2005, Md. Ann. Code Art. 16 § 75, Mass. Gen. Laws Ann. Ch. 119 §§ 24, 26. On the other hand, not all jurisdictions have the funding for a social service agency to perform effective efforts to reunite the family.

feel constrained to respond to Petitioners' comments pertaining to the New York State Department of Social Services. Although Petitioners' comments are more properly directed to the New York legislature, a significant part of the brief of *Amicus Curiae* Community Action for Legal Services, Inc. digresses from a discussion of the issues properly before the Court to an attack of the practices of State social service agencies generally and New York City social agencies in particular. However, the issue, in the words of *Amicus Curiae,* whether "child care agencies are far more stingy in the provision of help and services to these parents than the statute requires," (Brief at 41) has never been raised by Petitioners in the instant case in any of the proceedings below. Thus, *Amicus Curiae* in the guise of discussing the burden of proof question is now asking the Court to address the issue of whether social service agencies fulfill their mandated duties. It is submitted that state court is the proper forum for this question to be initially raised.

The inappropriateness of the Court to now air grievances concerning social service agency practices is underscored by *Amicus Curiae's* lack of authoritative citation. In criticizing agency practices, their brief repeatedly cites to "their own experience." (Brief 36-49). It would be unfair at this juncture of the proceedings to consider such conclusory and undocumented attacks on social service agencies as somehow relevant to a determination of what burden of proof is constitutionally mandated in a proceeding to terminate parental rights.

Furthermore, it is apparent that New York Courts have never acted as a "rubber stamp" in response to petitions for termination filed by social services agencies. Rather, the courts serve as a neutral and detached arbiter of the issue of termination. When an agency fails in its statutory responsi-

bilities, the courts act as a counterbalance to protect the rights of the parent. *See*, e.g., *Matter of Florence X., supra; Matter of Wayne T.D.*, 70 A.D. 2d 617, 416 N.Y.S. 2d 318 (2d Dept. 1979); *Matter of Mark G.G.*, 69 A.D. 2d 311, 419 N.Y.S. 2d 279 (3d Dept. 1979); *Matter of Anita P.P., supra; In Re Guardianship of Denlow, supra.*

However, the thrust of Petitioners' case is the risk of error under a permanent neglect litigation. To completely evaluate the issue, several layers of protection which substantially mitigate the risk of error under New York law should be considered.

First, the agency does not frequently seek judicial relief. Exhibit 12 sets forth the number of reports and cases of suspected child abuse and neglect in New York State. Upon a report of a problem, the agency investigates the situation and opens a case file if necessary. Although state intervention exists, neglect or abuse petitions are filed in only a small percentage of cases. For example, in 1978, of approximately 72,000 children involved in abuse or neglect, the agency went to court only 10% of the time.[30] (Compare E702 with 728; E710 with 729; E719 with 730.) These statistics document the position, upon which authorities agree, that the state acts in circumstances in which reasonable people would have little difficulty agreeing that the intenvention is justified. See *Defining Child Abuse, supra* at 9. Also, over half of the initial custody proceedings are settled by consent of the parties. (See E731-733). Obviously, if there is no litigation, there is no risk of error. Moreover, some cases are

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[30] Even though the number of petitions filed do not necessarily arise from the abuse and neglect cases filed in the same year, the minor variation in the numbers would not materially affect the relative proportions.

settled without litigation wherein the parents agree to accept the services of the agency. (See Exhibit 14 which sets forth statistical data from various New York State counties. This data was compiled at counsel's request in July 1981 solely for this litigation.)

Second, parental lack of interest after a child has been placed in foster care must be considered. Many extensions of foster care are either uncontested or granted by default (See Exh. 14). This, of course, is completely inconsistent with the position of a parent who believes that his child was wrongfully taken by the state.

Third, not all terminations are sought under § 384-b (4)(d) (permanent neglect) where the *theoretical* risk of error is the highest. (See Exh. 14 for upstate statistics and E925-926, 947-948 for New York City statistics).

Fourth, the largest layer of protection is found at the trial court level. The strength of the trial judge's decision in the instant case leaves little room for doubt, irrespective of the standard use. By deduction, the fact that the statute worked in this instant case, where the theoretical risk of error is the highest, means that it will work in less "subjective" situations.

Certainly, the Santoskys would have received the same protection before other judges in the state (See ACLU Brief p. 36-37). *See also Anonymous* v. *Norton*, 168 Conn. 421, 430, 362 A.2d 532, 537 (1974) ("We recognize the gravity of our decision and emphasize that the termination of parental rights is a most serious and sensitive action"); see also E924. There should be no doubt that trial judges do not need a message, in the form of an increased burden of proof, that parental rights are important.

Finally, the New York permanent neglect statute is narrowly construed by the appellate courts. See Section II. A., *supra*.

III. There Was No Error In The Proceeding Below For The Termination of The Santoskys' Parental Rights.

The progression of this litigation demonstrates that, beyond a reasonable doubt, the correct result was reached. The entire object of New York law is to protect families who, notwithstanding problems, are progressing toward the eventual reunification of the family. This is amply illustrated by what the Santoskys demonstrated at the first proceeding and what they did not show at the second.

Mr. and Mrs. Santosky made no progress in dealing with their child rearing problems. At the first termination hearing, Elizabeth Smith, Director of the Family Service Center, indicated that there was improvement in this area. However, even Mrs. Smith testified that if further delay would be detrimental to the children, the petition should be granted (See E254-256). The trial judge would not adopt this view and he was upheld on appeal.[31]

Since the judge could factually determine that progress was being made, he could legally conclude that the Santoskys were planning for their children's return. Had their miniscule efforts not diminished after the filing of the first petition, the second petition would, in all probability, also have been dismissed. The Santoskys' rights were not terminated because they failed to utilize all the services such as family planning or because Mr. Santosky was unemployed.

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[31] The judge's position and New York law is clear. There is no termination *merely* because the best interest of the child might require it. (E409-414).

The law is clear, parental cooperation with a plan need only be reasonable.

Simply stated, the Santoskys lost their children because they failed to produce a single witness, *including themselves,* to testify that progress was being made. Their utilization of available counseling services illustrates why this was the case. First, they agreed to attend the Southern Ulster Mental Health Clinic (E37). They refused to attend the Family Services Center on the ground that they were attending Mental Health (E44). Ironically, after the December 1977 evaluations (E679-684), they refused to attend the Mental Health Clinic on the assertion that they were going to the Family Service Center (Petitioners' Brief p. 10). In any event, they attended the Center approximately one-third of the time. Even the Center's Director, their strongest advocate at the first hearing, lost hope when they refused to participate in the Child Enrichment Program. She concluded that it would be impossible to return the children home in the foreseeable future (J.A. 16-18).

The presence of other children complicated the situation. Elizabeth Smith testified at the first permanent neglect hearing that, with another child in the home, it would be a bad idea to immediately return the others (E202-206). Even Mr. Santosky testified that it would be a lot easier if the children came home one at a time and to have the others visit overnight (E519).

At the second termination proceeding, the excessive length of time the children had spent in foster care had created a problem. These children now regarded their natural parents as strangers (J.A. 10, 12, 14, 21). The Santoskys' actions, which precipitated state intervention, now reduced their parental status to a mere biological relationship.

Finally, the law guardian for the children vigorously

argued, as he had in the first proceeding (E590-598), that the parental rights should be terminated (Tr. 421-432).

A. The Instant Case Demonstrates The Appropriateness of The Present Standard Under New York Law.

This case deals with the parental failure to plan for the future of the child but there are other situations in which parental rights can be lost. Under Social Service Law § 384-b(4)(a), if both parents are dead and no legal guardian has been appointed, then a termination can occur. Parental rights can also be lost under § 384-b(4)(c) if both parents are unable to care for their children by reason of a mental illness. However, to be successful under this section the government must prove its case by clear and convincing evidence. Social Service Law § 384-b(3)(g). Another ground for termination is where the child has been abandoned within the purview of § 384-b(4)(b). The state already bears a heavy burden under this section since it must show that a parent has forfeited his parental rights. Therefore, a child will not be deemed abandoned unless the evidence establishes a "purposeful ridding of parental rights—a withholding of interest, presence, affection, care and support," *Corey L.* v. *Martin L., supra,* at 443. Since the government's burden here is already difficult, a preponderance standard does not offend fundamental fairness under § 384-b(4)(b). See *Vance* v. *Terrazas,* 444 U.S. 252, 267 (1980).

Petitioners have failed to even assert a plausible argument of why the preponderance standard is inappropriate for the above mentioned termination methods.

The termination of parental rights, based upon failure to plan, is the litigation in which the risk of error is at its peak. Therefore, if the standard worked properly in the instant

case, it will no doubt work in other situations where the risk of error is less. This case is, therefore, the perfect medium through which the standard can be evaluated.

New York law requires that parents plan for the future of their children by working towards the *eventual* reunification of the family. Actual accomplishment of the goal is not required. Therefore, Petitioners have overlooked an important concept. This is, the primary focus of § 384-b (4)(d) is *prospective*. Under the law, judges are given an objective guideline to evaluate future human behavior based upon past performance (See E244, 247, 413).

The government's burden under this section is very heavy as the state must prove a negative state of mind. The agency must demonstrate that a parent does not intend to change, since if a parent intends to, but cannot, progress or plan for the future of his children, he is excused from doing so. Fam. Ct. Act § 614(d).

Proving a negative is one of the most difficult undertakings in trial practice. When combined with the showing that the parent will not progress in the foreseeable future, the successful prosecution of the agency's case becomes very difficult. No matter how much documentation or testimony the state provides, there is always the hope, however remote, that the parents will solve the problem and the children can be returned. As previously established, children have rights, also.

A motion is presently before the Court in the case of *Maffey* v. *Oregon*, No. 80-5227 [Or. App., filed Aug. 8, 1980]. A bench ruling in the case demonstrates the state's difficulty here. The lower court found, beyond a reasonable doubt, that the best interests of the child required termination. However, the judge could only find it was more likely than not that Mrs. Maffey would be unable to adjust or change her life. (See Exhibit 16.)

The New York statute goes a long way towards eliminating the soul-searching a trial judge must do when weighing the competing interests. The law stipulates that if no progress is made by the parents within one year, then it is presumed that parental rights should be terminated. However, this is only a presumption which can be rebutted at the dispositional hearing. Such a procedure is fundamentally fair to the parents since mere progress by way of minimal cooperation with the social service agency is enough.

The underlying facts which determine whether the parents cooperated with the agency are readily ascertainable and therefore no higher burden of proof is required.

However, the real safeguard lies in how easily a parent can defeat the state's prima facie case. Although the burden of proof always lies with the government, the burden of going forward will shift as the litigation develops. A typical TPR case will proceed as follows. The state will produce witnesses to testify that no progress or planning took place in a certain one year period. Assuming that the witnesses were not completely impeached by cross examination, the burden of going forward will shift to the parents who will attempt to show what was done in the same year. It is here that the state's case can easily be defeated. The parents need only produce a witness, *including themselves,* to tell the court what progress and planning transpired.

This is clearly illustrated by the instant case. At the first termination proceeding, in addition to the testimony of Elizabeth Smith (See E212-213, 241), Mr. Santosky took the stand and testified that he was planning for the future of his children by increasing the available living space in his home (E488). Both the trial (E619) and appellate courts (See *Matter of John W., supra*) found this action to be planning even though the agency never considered housing a problem (E499-500). Mr. Santosky's actions stand in

stark contrast to the second termination proceeding where neither he nor his wife testified.

Moreover, there is a rational relationship between the burden of proof and the nature of the case. The law assumes that if a parent fails to make any progress in one year it is more likely than not that he will be unable to change in time to successfully reunite the family. This is a sound legislative judgment based upon the established fact that problems arise for the child, and for eventual reunification of the family, if placement in foster care exceeds one year (*See* E49, 134 and *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 836 (1977). It is also sound legislative judgment based upon the nature of the therapeutic and rehabilitative process, which cannot be overturned in the absence of blatant fundamental fairness violations.

The state's burden is already heavy. It must show what a person, based upon past actions, will not do in the future. As it takes so little testimony by way of readily ascertainable facts to dismiss the petition, there is no need to make the process more difficult (See E924).

Finally, the result of the agency's action is to place the child in a permanent home. Indeed, the state succeeds in obtaining permanency over half the time when termination occurs. (See Exhibit 17.)

B. In The Alternative, The Instant Case Need Not Be Remanded Since It Is Correct Under Any Standard of Proof.

In the exercise of its appellate jurisdiction, this Court not only has the power to correct error in the judgment under review, but also to make such disposition of the case as justice requires. *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1939). In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), a statute was found unconstitutional and the Court

reviewed the record to determine whether the evidence was sufficient to meet the new standard.

If the Court finds that another burden is constitutionally mandated, it is respectfully maintained that there exists a moral imperative to review the record and determine whether the evidence meets the new standard. The children should be left in limbo no longer.[32]

There should be no doubt but that the children were permanently neglected beyond a reasonable doubt and that the trial judge had absolutely no reservations about his factual findings. Although the judge used the preponderance standard, he expressed his real feelings on parental terminations at the first hearing (E246):

> When you permanently terminate parental rights you cut them off and terminate them for all time. It's a very serious thing for any court to be asked to do. I frankly shy away unless it's absolutely necessary in order to discharge my responsibility that I must do so out of the long term best interests of the children and substitute the interests of the parents and put that down at the bottom of the list of priorities.

At the first termination proceeding, the judge found that although the Santoskys were not model parents, they were progressing. At the second proceeding, since their efforts were no longer measurable, he was convinced that the family could not be reunited in the foreseeable future and granted the petition.

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[32] Furthermore, the agency must make diligent efforts for at least one year before a permanent neglect action could even be entertained. Since the parental rights were terminated, no efforts, much less diligent ones, have or could have been undertaken by Ulster County to reunite the family. Thus, a remand to the state court could frustrate any chances these children have of obtaining a permanent home.

Accordingly, the factual determinations of the trial court are more than adequate to permit disposition of the case without a remand under a higher standard of proof.

CONCLUSION

In light of the foregoing, Respondent requests that the judgment of the Supreme Court of the State of New York, Appellate Division, Third Department, be affirmed.

Respectfully submitted, this 10th day of August, 1981:

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Counsel wish to express their deep appreciation to Gail J. Cummings, a third year student at the George Washington University, National Law Center. Ms. Cummings provided invaluable assistance towards the preparation of this brief.

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS, CLERK

NO. 80-5889

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

vs.

BERNHARDT S. KRAMER, COMMISSIONER ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondents.l

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

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QUESTION PRESENTED

Whether New York's statutory provisions governing the transfer and commitment of custody and guardianship of children in foster care, particularly its permanent neglect proceedings, requiring proof by a fair preponderance of evidence, violates Due Process?

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STATEMENT OF THE CASE

The infant subjects of this appeal are: Tina Apel, born April 15, 1971, John Santosky, born August 22, 1973 and Jed Santosky, born August 19, 1974. Petitioners are their natural parents. Tina was removed from petitioners' custody on November 20, 1973 when she was two and one-half years of age and placed by the respondent Ulster County Department of Social Services in a foster home. John was also removed from petitioners' custody on August 19, 1974 only a few days before his first birthday and placed in a foster home. Jed was placed in his first and only foster home directly from the hospital when he was only five days old. All of them were court placed due to parental neglect.

Jed has resided with Mr. and Mrs. Balogh, Respondents-Intervenors, his first and only foster family since placement to date.

Mr. and Mrs. Balogh have provided Jed with excellent care and nurturance, indeed this is the only home and family he has ever known. Mr. and Mrs. Balogh have regularly appeared before Ulster County Family Court and participated in the permanent neglect proceeding and appeals therefrom.

The children's initial removal from petitioners' care and initial placement in foster care was ordered by the Ulster County Family Court after bifurcated hearings[1] in accordance with article 10 of the Family Court Act of New York. Their initial placement was for eighteen months, the maximum initial period permitted by the statute. Thereafter the Family Court annually reviewed and extended the children's foster care placements pursuant to F.C.A. §1055.

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1. New York's Child Protective Statute requires an initial fact-finding proceeding (F.C.A. §1044) to determine if state intervention is warranted and a separate dispositional hearing (F.C.A. §1045) to determine if the children's safety requires placement out of the home.

Under New York's statutory scheme both the petitioners (if indigent) were entitled[2] to and availed themselves of, assigned legal counsel and likewise, the children,[3] were assigned a law guardian to provide them with independent legal representation at each and every stage of the neglect proceedings.

New York's provision for counsel is also applicable to custody and guardianship proceedings pursuant to section 384-b of the Social Services Law of New York, the so-called termination proceedings. The standard of proof required by New York statutory scheme, a fair preponderance of the evidence, is the same for both the neglect and abuse proceedings and termination proceedings.[4]

These children were again before the Ulster County Family Court in September, 1976 when the respondent petitioned the court pursuant to Article Six of the Family Court Act, New York's permanent neglect statute. The Court (ELWYN, J.) held *inter alia* that the respondent failed to establish by a preponderance of the evidence that petitioners had failed to plan for the children's future care. See, *Matter of Santosky*, 89 Misc. 2d 70 (Family Ct., Ulster Co., 1977), aff'd sub. nom. *Matter of John W.*, 63 A.D.2d 750 (3rd Dept. 1973).

Two years later in October, 1978, the children were once again the subject of judicial inquiry when respondent brought a second permanent neglect proceeding. The Court (ELWYN, J.) on March 12, 1979 after four days of fact-finding determined that the petitioners had permanently neglected these children by

2. F.C.A. §262.

3. F.C.A. §249.

4. New York imposes the preponderance of the evidence standard in virtually all judicial proceedings involving foster care placement of children.

reason of their failure to plan for their future care. On April 5, 1979 a separate dispositional hearing was held at the conclusion of which custody and guardianship of the children was transferred from the petitioners and committed to the respondent for the purpose of adoption. Testimony from Dr. Sportman, the child psychiatrist, was uncontradicted as to Jed. He was found to be a gifted child of superior intellect with no diagnosed phobias. It was further found that Jed was an integral member of the Balogh foster family. It is from this determination that petitioners appeal.

SUMMARY OF ARGUMENT

The decision and determination of the Ulster County Family Court that adoption of Jed Santosky by the foster family with whom he has lived for the past seven years was not made in derogation of the Constitutional rights of the petitioners. New York's statutory provisions to protect and promote the best interests of the defenseless children are fundamentally fair. New York's evidentiary provisions properly balance the competing private interests at stake, namely the parents, the children and their *de facto* parents, the foster parents, with important government interests.

The petitioners claim that Due Process requires a higher standard of proof than a fair preponderance of the evidences ignore the paramount interest at stake. It is premised upon a Constitutional right to "family life" which emphasize blood ties rather than existing relationships. It is really a claim of parents which would relegate children to chattel status, a posture long rejected by this Court. New York has gone to great lengths to insure that the interests of its defenseless children are given paramount consideration. New York's statutory provisions governing the intervention by the State in the family cannot be weighed piecemeal. We deal here with child protective proceedings, with the obligations of parents and a child's right to nor-

mal family life once removed from neglectful parents' care and placed in foster care.

The State has not caused a break-up of an existing family unit. Instead, the State has interceded to protect a defenseless child from parents who have failed to act as parents. There is no existing family unit which the Court has irrevocably severed. The State here has simply given recognition to Jed's new *family* which has resulted from the failure of the parents to fulfill clear parental obligations, in particular by their failure to make any provisions or plan for the child's future well-being over an extended period of years. Indeed, they never even sought to terminate the placement of the children, thus leaving Jed in limbo since 1974.

We submit that New York's requirement of proof by a fair preponderance of the evidence in guardianship proceedings correctly recognizes the paramount interest of the child to a loving stable home, strikes a proper balance amount competing interests and when considered in light of all the statutory safeguards governing foster care does not present an undue risk that an erroneous termination of parental rights will occur.

ARGUMENT

NEW YORK'S STATUTORY PROVISIONS GOVERNING THE TRANSFER AND COMMITMENT OF THE CUSTODY AND GUARDIANSHIP OF CHILDREN IN FOSTER CARE, PARTICULARLY ITS PERMANENT NEGLECT PROCEEDINGS REQUIRING PROOF BY A FAIR PREPONDERANCE OF THE EVIDENCE, ARE FUNDAMENTALLY FAIR AND DO NOT OFFEND DUE PROCESS.

New York has created a progressive and enlightened statutory scheme designed to promote and protect the welfare and well-being of its dependent, neglected and abused children of which the permanent neglect proceedings here under attack are but one facet. The Legislature's intent was to provide a solution to the situation created where the parent of a child in foster care fails to act as a parent but nonetheless refuses to consent to the child's adoption. In passing on this statute New York's Supreme Court, Appellate Division noted in *Matter of Klug*, 32 A.D.2d 915 (1st Dept. 1969):

> "The emphasis of the statute was not on the rights of natural parents, but on the plight of thousands of forsaken children whose parents had abandoned their responsibilities of care and support. A parent who has failed in her obligation to maintain, care for, protect and plan for the future well being of her child, has forfeited her parental rights. The welfare of the child is still the primary and paramount concern of the Court."
>
> *Klug*, at 916.

This Court on many occasions, and most recently, in *Lassiter v. Dept. of Soc. Services*, 49 U.S.L.W. (1981), has instructed that

> "For all its consequence, 'due process' has never been, and perhaps can never be precisely defined. Unlike some legal rules', this Court has said, due process i.e. is

> not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895. Rather, the phrase expresses the requirements of '*fundamental fairness*', a requirement whose meaning can be as opaque as its importance is lofty. *Applying the Due Process clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.*"
>
> *Lassiter,* id at 4587

With these instructions in mind we turn first to the paramount interest at stake: the interest of the children.

A.

We agree with petitioners that the family holds a position of great importance in our society. We acknowledge, too, that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). However, we could not disagree more strongly with petitioners' central premise that the Constitution recognizes and protects only the biological family and a child's blood ties. Where, as here, the natural family unit has long been supplanted by a foster family unit due to parental unfitness, New York's statutory provisions to terminate permanently the nominal biological ties in recognition of the child's *de facto* family are fundamentally fair.

This Court has previously recognized that blood relationships are not the only relationships worthy of the Constitution's protection. The foster parent and foster child ties have been acknowledged by the Court as comparable with the biological tie. In *Smith v. OFFER,* 431 U.S. 843 (1977) it was noted at 845:

> "[But] biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation . . . . ,

[T]he importance of the family relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] in a way of life' through the instruction of children, *Wisconsin v. Yoder,* 406 U.S. 205, 231-33 (1972), as well as from the fact of blood relationship. *No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship."* (emphasis added)

Petitioners proceed on the erroneous and somewhat chauvinistic premise that their liberty interest in maintaining family integrity is superior to, or synonomous with the children's interest. Their error is further compounded by their failure to recognize that once the biological family integrity has been dissolved and the children displaced due to parental neglect, as here, the children's liberty interest becomes distinct and separate from the parents. Given the risk of harm to the children if returned to the biological parents' care, the children's interests are equal to, if not superior to, the interests of the parents.

The petitioners' unfitness and the very real risk of danger they present to the children's physical, emotional and mental health and well being was previously determined by the Ulster County Family Court and the State's intervention fully justified. This petitioners concede as well they must. Thus, the dissolution of the family was occasioned not by the State but by the petitioners' transgressions. Likewise, the continued separation of the children from the petitioners has been annually determined and ordered by the Family Court.

The children's interests after they have been removed from the admittedly neglectful parents changes considerably. Their interests, though seemingly basic, must now be of paramount importance if they are to grow to maturity as healthy contributing members of society. Their needs are for the physical and emotional nurturance the petitioners did not and cannot provide.

New York recognizes the need for such nurturance and for stability for such children who are unable to live with their natural family. See, e.g. §384-b(1)(b). Social Services Law.

Experts in the child care field concur. Goldstein, Freud and Solnit, in their most recent study "BEFORE THE BEST INTERESTS OF THE CHILD," state:

> "We propose the following periods during which a child is in the direct and continuous care of the same adult(s) as maximum intervals *beyond which it would be unreasonable* to presume that a child's residual ties with his absent parents are more significant than those that have developed between him and his longtime caretakers:
>
> (a) 12 months for a child up to the age of 3 years at the time of placement.
>
> (b) 24 months for a child from the age of 3 years at the time of placement."
>
> Page 46
>
> * * *
>
> "Even if his biological parents were ideal, even if they were in all ways superior to the Appletons, and even if the state were in error in its initial decision to place Tom in foster care or to leave him there for more than a temporary period, Tom should never have been used to remedy those mistakes or as an award for damages.* What was once intended to be a "temporary" placement had become permanent. *The relationship between Tom and the Appletons deserved recognition and should have been treated with the same finality as the traditional placement of a child with his biological parents. Only in that way could the court have given credibility to its announced policy to favor family unity* and judicial "restraint in removing a child from its parents except under the most unusual conditions." (emphasis added)
>
> Page 57

The petitioners' interest which they claim the statute infringes by its lesser burden of proof is, the interest to maintain the children in the limbo of foster care. They seek to maintain the facade of a family though no family unit remains.

Thus, the interests of the children in foster care to stability and continuity of loving care must take precedence over the claimed parental interest of maintaining the bonds of family which have long since been broken.

The State's interest is coextensive with the child's. New York seeks to end the limbo of foster care for those children who cannot return to the natural parents and who have established lasting loving ties to their foster parents who are willing to give them a permanent homelife. The intent of the New York State Legislature is stated as follows (New York State Social Services Law §384-b):

"It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption."

B.

The fair preponderance of the evidence standard of proof imposed by New York seeks to balance these competing interests.

The Supreme Court Appellate Division, Third Department stated in upholding this standard of proof from which this appeal has been taken:

> "In adhering to our decision, we note that the permanent neglect statute (Social Services Law, §384-b; Family Ct. Act §611, et. seq.) recognizes and seeks to balance rights possessed by the child (see Social Services Law, §384-b, subd. 1; *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 547) with those of natural parents (see Social Services Law, §384-b, subd. 1; *Matter of Sanjivini K.*, 47 N.Y.2d 374, 382; *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383, 392" *Matter of Santosky*, 76 A.D.2d 837 (3rd Dept. 1980).

It would be violative of the rights of the foster child who after years in a foster home has no *meaningful* relationship with his or her neglectful biological parent to require a greater degree of proof in order to formally recognize the *family relationship* with his foster parents. The adoption by the legislature of New York of the preponderance of the evidence standard assures that the scales are not weighed against the child and in favor of his unfit natural parents.

We believe that the Arizona Court of Appeals in *Hernandez v. State ex rel Arizona Dept. of Econ. Sec.*, 23 Ariz. App. 32, 530 P 2d 389 (1975) succinctly sets forth the very real risk a higher standard of proof presents:

> 'In a termination proceedings an error in factual determination can result in the termination of the parental relationship when such termination is not justified. *On the other hand it can result in the failure to terminate when the relationship should be ended . . . . a child as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes.* Comparing the social utilities of these two erroneous outcomes, we do not believe that one can make a fundamental value determination that the erroneous severance of parental rights, vis-a-vis the erroneous failure to sever, constitutionally requires a higher burden of proof." 530 P 2d at 393. (empahsis added)

We believe where, as here, the petitioners have been previously adjudged unfit parents by the Family Court and their separation from the children annually reviewed and continued by the Family Court, a balancing test is both logical and necessarily fair.

C.

In assessing the risk that the procedures used will lead to erroneous results, the Court must consider the entire statutory scheme created by New York to protect the rights of children. The permanent neglect requires not for one but two separate and distinct hearings. §622 and 623 Fam. Ct. Act. At each stage counsel is statutorily required for the indigent parent §262 Fam. Ct. Act. Moreover, the appointment of law guardian for the child is mandatory. §249 Fam. Ct. Act.

The resources of the Court frequently utilized include the Bureau of Mental Health Services for psychiatric and psychological evaluations and independent evaluations of the parties by probation. N.Y.C.R R. §2506.2. Special provisions are also available for prompt appellate review. Article 11, Fam. Ct. Act.

Moreover, once having been placed in foster care, New York requires an annual review of placement under Section 1055 of the Fam. Ct. Act for those children who have been adjudged neglected or abused. For dependent children voluntarily placed in foster care, New York requires Court approval of the initial placement (Section 358 of the Social Services Law) and periodic review every eighteen months by the Famnily Court. See, Section 392 of the Social Services Law.

Here, petitioners' longstanding neglections has been fully chronicled by the Court. The oldest child was placed in 1973. The other two boys have been in placement since September, 1974. This placement has been continuous. There have been at least several reviews pursuant to Section 1055 of the Fam. Ct. Act as well as a prior termination proceeding. Thus, the Court has scrutinized the petitioners and children on at least five occasions prior to the commencement of this permanent neglect proceeding.

With all of these safeguards, and this plethora of legal proceedings, it is difficult to see how petitioners can contend that they have been denied due process. The imposition of a higher standard of proof will only serve to increase the risk that

neglected children, such as these, will remain in the limbo of foster care, unable to return to the biological parents due to their unfitness and yet unable to enjoy the permanency of a loving stable home environment. This result this Court cannot countenance.

Finally, we would note certain emotionally laden charges, leveled by petitioners. Here, the petitioners, although indigent, have always had the same counsel since at least the time Jed came into care in 1974. The children have always been represented by a law guardian (the same attorney who has represented them in the Section 1055 Fam. Ct. Act reviews as well as throughout the permanent neglect proceedings).

Petitioners contend that termination proceedings are particularly vulnerable to cultural and class bias. While it might be true that many natural parents with children in the foster care system are indigent, they are entitled to free legal representation at all stages of the proceedings. Petitioners' inference that indigent natural parents receive less than adequate legal representation in these proceedings would come as quite a shock to the highly skilled lawyers from the various publicly funded law offices such as Mobilization for Youth or Community Action for Legal Services who have filed an *amicus curiae* brief with this Court.

The Appellate Divisions of the New York State Supreme Court (First and Second Judicial Departments) also require that assigned counsel first be approved by screening panels. Additionally, proficiency in Family Court proceedings is required.

Likewise petitioners' contention that respondent have endless financial resources to prosecute these proceedings simply ignore the budgetary restraints and fiscal realities confronting foster care agencies. They ignore too the fact that these proceedings can also be brought by foster parents whose funds are likewise limited. See, §392(7)(c) Social Services Law.

The natural parents' attorney can also utilize a court ordered psychiatric/psychological examinations and independent investigations at no expense by the Office of Probation.

See, N.Y.C.R.R. §2506.2 Unifom Fam. Ct. Rules. These are services offered by the Court.

Finally we would note that upholding New York's statutory provisions requiring proof by a fair preponderance of the evidence will simply give legal recognition to a family unit which has been in existence since 1974. A result not unlike that reached by this Court in *Quillon v. Walcott*, 434 U.S. 246 (1978):

> "But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. *Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence a result desired by all concerned, except appellant.*" (emphasis added) *Quillon* at 246

CONCLUSION

For the reasons stated herein, respondent-intervenors pray that the judgment and order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department be affirmed.

Respectfully submitted,

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APPENDIX A

Family Court Act

§1055. Placement.

(a) For purposes of section one thousand fifty-two the court may place the child in the custody of a relative or other suitable person, or of the commissioner of social services or of such other officer, board or department as may be authorized to receive children as public charges, or a duly authorized association, agency, society or in an institution suitable for the placement of a child.

(b)(i) Placements under this section may be for an initial period of eighteen months and the court in its discretion may at the expiration of that period, upon a hearing, make successive extensions for additional periods of one year each. The place in which or the person with whom the child has been placed under this section shall submit a report at the end of the initial period of placement, and at the end of the period of a placement extension, making recommendations and giving such supporting data as is appropriate.

(ii) No placement shall be extended or continued pursuant to this subdivision except upon a hearing held concerning the need for extending or continuing the placement. Such hearing shall be held upon the court's own motion or upon the motion of the person, agency or institution with whom the child was placed or of the foster parent or parents in whose home the child resided during the period of placement.

* * *

(d) In addition to or in lieu of an order of extension or continuation of a placement made pursuant to subdivision (b), the court may make an order directing a social services official or other duly authorized agency to institute a proceeding to legally

free the child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such official or agency to institute such a proceeding within ninety days after entry of such order, the court shall permit the foster parent or parents in whose home the child resides to institute such a proceeding unless the social services official or other duly authorized agency caring for the child, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding.

Social Services Law

§392. Foster care status; periodic family court review.

1. As used in this section, unless otherwise expressly stated or unless the context requires a different interpretation,

(a) "foster care" shall mean care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, health care facility or any combination thereof;

(b) "child" shall mean a child under the age of eighteen years for whom an authorized agency is providing foster care, except a child who is in the care of an authorized agency pursuant to court order under article seven or ten of the family court act.

2. Where a child has remained in foster care for a continuous period of eighteen months a petition to review the foster care status of such child together with a copy, if any, of the placement instrument:

(a) shall be filed in the family court by the authorized agency charged with the care and custody or the guardianship and custody of such child;

(b) may be filed by another authorized agency having the supervision of such foster care;

(c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months.

* * *

3. Such petition:

(a) shall be filed in the family court in the county in which the authorized agency charged with the care and custody or the guardianship and custody of such child has its principal office or where the child resides;

(b) shall set forth the disposition sought and the grounds therefor;

(c) shall, when filed by an authorized agency and notice is to be given to a parent, guardian or relative of the child, omit, for good cause shown, the name and address of the foster parent or parents with whom such child is residing at the time of the filing of the petition and the name and address of the biological parent or parents and, in lieu thereof, there shall be filed with such petition a verified schedule executed by such agency setting forth the name and address of such foster or biological parent or parents.

4. Notice of the hearing, including a statement of the dispositional alternatives of the court, shall be given and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:

(a) the authorized agency charged with the care and custody or the guardianship and custody of such child, if such authorized agency is not the petitioner;

(b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;

(c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;

(d) the child's parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;

(e) a person to whom a parent entrusted the care of the child, where such person transferred the care of the child to an authorized agency;

(f) such other persons as the court may, in its discretion, direct.

5. Unless the court grants an order to show cause to be served in lieu of a notice of the hearing and the petition, service of notice of the hearing and the petition shall be made at least twenty days before the date of said hearing in such manner and on such notice as the court may, in its discretion prescribe; provided, however, that where the court prescribes service by mail, such service shall be made by registered mail or certified mail, return receipt requested. If service cannot be made in the manner prescribed by the court, the court may prescribe an alternative method of service.

* * *

7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:

(a) directing that foster care of the child be continued; or

(b) in the case of a child whose care and custody have been transferred temporarily to an authorized agency directing that the child be returned to the parent, guardian or relative; or

(c) in the case of a child whose care and custody have been transferred temporarily to an authorized agency directing any agency specified in subdivision four of this section to institute a proceeding, pursuant to section three hundred eighty-four-b of this chapter to legally free such child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such agency to institute such a proceeding within ninety days after entry of such order, the courts shall permit the foster parent or parents in whose home the child resides to institute such a proceeding unless the agency, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent

or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding or

* * *

9. The court may make an order directing an authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child. Such order may include a specific plan of action for the authorized agency including, without limitation, requirements that such agency assist the parent in obtaining adequate housing, employment, counselling, medical care or psychiatric treatment.

10. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall rehear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twenty-four months.

* * *

Family Court Act

§249. Appointment of law guardian.

(a) In a proceeding under articles seven or ten of this act or under section three hundred eighty-four-b of the social services law, or when a minor is sought to be placed in protective custody under section one hundred fifty-eight of this chapter, the family court shall appoint a law guardian to represent a minor who is the subject of the proceeding or who is sought to be placed in protective custody, if independent legal representation is not available to such minor. . . .

* * *

§262. Assignment of counsel for indigent persons.

(a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the judge shall advise such person before

proceeding that he has the right to be represented by counsel of his own choosing, of his right to have an adjournment to confer with counsel, and of his right to have counsel assigned by the court in any case where he is financially unable to obtain the same:

(i) the respondent in any proceeding under article ten of this act;

(ii) the respondent in any proceeding under article eight of this act;

(iii) the respondent in any proceeding under part three of article six of this act;

(iv) the parent, foster parent, or other person having physical or legal custody of the child in any proceeding under section three hundred fifty-eight-a, three hundred eighty-four, three hundred eighty-four-b, or three hundred ninety-two of the social services law;

* * *

Office - Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS
CLERK

NO. 80-5889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

vs.

BERNHARDT S. KRAMER, Commissioner, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 80-5889

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

vs.

BERNHARDT S. KRAMER, Commissioner, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

POINT I

NOTWITHSTANDING THE COURT'S DECISION IN LASSITER v. DEPARTMENT OF SOCIAL SERVICES, TERMINATION OF PARENTAL RIGHTS BASED UPON A PREPONDERANCE OF EVIDENCE VIOLATES DUE PROCESS OF LAW.

Since petitioners' brief was submitted this Court decided *Lassiter v. Department of Social Services,* 452 U.S. ____, 68 L.Ed.2d 640 (1981). Respondent has concluded from his reading of *Lassiter* that since a termination of parental rights "proceeding does not concern physical freedom, a fundamental liberty interest is not at issue." Brief for Respondent, p. 11. In fact, in *Lassiter* this Court re-emphasized the truism that a parent's right to his or her children is an extremely important constitutional right. 68 L.Ed.2d at 649-650 and 652. As Justice Blackman's dissent observed, the interest a parent has in his or her children "occupies a unique place in our legal culture. . .and. . .[is] more significant and priceless than 'liberties which derive merely from shifting economic arrangements.' " 68 L.Ed.2d at 656-657 (citations omitted). Justice Blackman was able to cite a host of cases to support the conclusion that parents' rights have "been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment." 68 L.Ed.2d at 657. Justice Stevens, also in dissent, characterized loss of parental rights as "more grievous" than mere incarceration. 68 L.Ed.2d at 670.

The Court reached its conclusion that counsel is not automatically required in termination proceedings only

because it determined that there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." 68 L.Ed.2d at 649. Against this presumption the Court held that due process is satisfied by leaving "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." 68 L.Ed.2d at 652.

Petitioners submit that no like presumption exists in standard of proof cases or, alternatively, that if such a presumption does exist, proper analysis requires a higher standard of proof than preponderance of evidence in termination proceedings.

A. Standard Of Proof Cases Do Not Turn On Loss of Physical Liberty.

Counsel cases decided before *Lassiter* had explicitly held that counsel is required only when one loses physical liberty. In *Scott v. Illinois,* 440 U.S. 367 (1979) this Court ruled that counsel is not required in criminal proceedings unless the accused suffers actual imprisonment. Unlike in counsel cases, case law demonstrates that the issue of physical liberty is not the determinative factor in standard of proof cases.

Perhaps the strongest demonstration of this is the Court's reasoning in *Vance v. Terrazas,* 444 U.S. 252 (1980). In *Terrazas* the Court did not hold that citizens had to overcome any presumption in challenging the standard of proof in expatriation cases. Instead, the Court engaged in a careful analysis of the factors involved and, focusing on the heavy substantive burden placed on the government, con-

cluded that the preponderance of evidence standard was constitutionally acceptable.

In *In re Winship*, 397 U.S. 358 (1970), the Court emphasized two factors in determining that proof beyond a reasonable doubt is required in delinquency proceedings. These factors were loss of physical liberty and stigmatization. 397 U.S. 363. However, Winship did not hold that only juveniles who are deprived of their liberty are entitled to a higher standard of proof. Proof of wrongdoing beyond a reasonable doubt is required in all delinquency proceedings whether or not the delinquent actually is deprived of his physical liberty. *Cf. Taylor v. Kentucky*, 436 U.S. 478 (1978).

Finally, although adverse findings in *Addington v. Texas*, 441 U.S. 418 (1980) necessarily involve loss of physical liberty, in requiring clear and convincing evidence in civil commitment proceedings, the Court emphasized equally deprivation of physical liberty and the adverse social consequences which flow from a finding that an individual needs to be committed to a mental health facility. 441 U.S. at 425-26. *Cf. Vitek v. Jones*, 445 U.S. 480 (1980).

B. The Preponderance Of Evidence Standard Is Constitutionally Deficient In Termination Cases.

Even if there is a presumption of constitutionality in standard of proof cases unless a person risks loss of physical liberty, the preponderance of evidence standard in termination of parental rights proceedings is constitutionally offensive. As Justice Blackman observed in *Lassiter*, "(i)t is not disputed that state intervention to terminate the relationship between petitioner and her child must be accomplished

by procedures meeting the requisites of the Due Process Clause." 68 L.Ed.2d at 656 (dissenting).

For purposes of providing counsel, this Court has held that due process may or may not require counsel in any given case. Case by case review of the need for counsel has precedential roots. *See, e.g., Betts v. Brady,* 316 U.S. 455 (1942); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Courts know how to evaluate the fundamental fairness of a proceeding and stand ready to reverse upon review at the appellate level when the absence of counsel if found to be unfair. As Justice Powell, with Justice Rhenquist joining, observed in *Argersinger v. Hamlin,* 407 U.S. 25, 63-67 (1972), by taking into account "the complexity of the offense charged" and "factors peculiar to each case," including the individual's competence to present his own case, "the sensitivity and diligence of individual judges" and the existence of a defense, appellate courts can decide whether fundamental fairness in a trial has been observed.

However, in standard of proof cases, allocation of risk necessarily must be calibrated in advance. No similar mechanism for case by case review is possible in standard of proof cases. The question posed by this case is whether due process is served when parental rights are severed based on evidence which established merely that the existence of certain facts was more probable than their non-existence. This is either fundamentally fair or it is not.

The Court has recognized that "(a) parent's interest in the accuracy and justice of the decision to terminate his or her parental status is. . .a commanding one" and an interest, in fact, shared by the state. *Lassiter v. Department of Social Services,* 68 L.Ed.2d at 650. Counsel may be unnecessary in every case to assure "the accuracy and justice of the

decision."* Raising the standard of proof can never be said to be unnecessary. Whenever a decision to terminate parental rights is based on a mere preponderance of evidence, "the accuracy and justice of the decision" is suspect. The parent's and state's interests in an accurate and just decision is constant and is assured only by requiring evidence which convinces the finding of fact by greater than a preponderance of evidence.

POINT II

THE GOVERNMENTAL BURDEN TO PROVE PERMANENT NEGLECT IS NOT HEAVY.

Recognizing that the difficulty of the government's substantive burden is an important factor in determining the constitutionality of section 622 of the New York Family Court Act, respondent suggests that the government's burden in permanent neglect cases is very heavy. Brief for Respondent, pp. 44-47. This contention is clearly wrong on a brief look at the statute and relevant case law demonstrates.

In the first full paragraph on p. 45 of respondent's brief it is suggested that "the primary focus of §384-b(4)(d) is *prospective*." However the plain language of the statute shows this to be simply untrue. To find permanent neglect, a court is to look at *past* conduct of the parent, not to predict

*Among the factors listed to support the decision in *Lassiter* is that findings of fact in North Carolina must "be based on clear, cogent and convincing evidence." North Carolina Gen. Stat. §7A-289.30. 68 L.Ed.2d at 651.

future conduct. The party seeking to terminate parental rights must show that for a period of one year after the placement of their children, the parents failed substantially and continuously or repeatedly to maintain contact with their children or plan for their future. Family Court Act §614(d). Once it has been established that the parents failed to maintain contact or plan in the past, the statutory standard is met. No inferences need be made as to whether the parents might accomplish a plan in the future.

Permanent neglect as a ground to terminate parental rights must be distinguished from other statutory grounds including abandonment and mental illness. *See* Social Services Law § §384-b(4)(b) and (c). Thus cases such as *Matter of Cory L. v. Martin L.*, 45 N.Y.2d 383, 408 N.Y.S.2d 439 (1978), relied upon by respondent, have no bearing on this case except to serve as a sharp contrast with permanent neglect. Under New York substantive law, abandonment cannot be found without demonstrating a "purposeful ridding of parental rights - a withholding of interest, presence, affection, care and support." 45 N.Y.2d at 391, 408 N.Y.S.2d at 443. This stands in sharp contrast with permanent neglect.

Respondent continues his argument by suggesting that the state must show a negative state of mind to be successful in a permanent neglect case. Brief for Respondent, p. 45. The words of the statute again show this to be patently false. In defining "failure to plan," the statute expressly provides that *good faith effort shall not of itself, be determinative.*" Social Services Law §384-b(7) (c) (emphasis supplied). Case law underscores the backward looking nature of inquiry. The New York Court of Appeals has held:

> To be sure, the mother has evinced a 'burning desire' to regain custody of the child, but it is undisputed that in

> the three years she failed to take the affirmative steps necessary to insure that Orlando would be the rightful beneficiary of an adequate home life if returned to her.

Matter of Orlando F., 40 N.Y.2d 103, 110, 386 N.Y.S.2d 64, 67 (1976).

If section 384-b(4) is prospective at all, the prospective determination is not an individual one but one which has been made by the Legislature. Effectively this section constitutes a legislative inference that if parents fail to maintain contact or to plan for a year, there is a sufficient likelihood that they will not do so in the future. Respondent recognizes this by stating that "(t)he law assumes that if a parent fails to make any progress in one year it is more likely than not that he will be unable to change in time to successfully reunite the family. This is a sound legislative judgment. . ." Brief for Respondent, p. 47. Petitioners do not dispute this contention and are not challenging this standard. This case addresses the degree of certainty necessary to find there was a failure to plan.

Rather than having a heavy burden, an agency is able to prove permanent neglect by extremely subjective proof making the agency's task decidedly easier, not more difficult. As already demonstrated in the Brief for Petitioners at p. 27,

> under New York law a court may terminate parental rights where it finds by a preponderance of evidence that a) the absence of diligent efforts by an agency to reunite the parent and child was excusable as not being in the child's best interests and b) even though the parents have maintained contact or planned for the future of the child in good faith, there was an absence of 'concerned parenthood' or the plan was not 'realistic.'

Commendably, respondent admits that the risk of error is highest in permanent neglect proceedings over all other termination actions in New York. Brief for Respondent, pp.

41, 44. Such proceedings need a higher standard of proof than preponderance of evidence to assure that when the momentous decision to terminate is made, it is very likely correct.

Respondent also acknowledges that even after termination is ordered, permanency — the only legitimate state interest in terminating in the first place — is reached slightly over half the time. Brief for Respondent, p. 47. By respondent's own admission, the social utility in making it easy to free children for adoption is realized in only a preponderance of the time. In such circumstances, the state's interest in helping children is not heavy. In a substantial number of cases (some 9000 children out of 20,000) termination was more harmful to the children than helpful. *See* Respondent's Exhibit 17.

In this case, the trial court permanently severed petitioners' parental rights based on evidence which was found only to be more likely right than wrong. The Constitution requires more.

CONCLUSION

For the above-stated reasons, petitioners pray that the judgment and order of the Supreme Court of the State of New York, Appellate Division, Third Department be reversed.

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Office-Supreme Court, U.S.
FILED
MAY 30 1981
ROBERT L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

—v.—

BERNARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION CHILDREN'S RIGHTS PROJECT, NEW YORK CIVIL LIBERTIES UNION, AND CONNECTICUT CIVIL LIBERTIES UNION, *AMICI CURIAE*

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IN THE
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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION CHILDRENS RIGHTS PROJECT, NEW YORK CIVIL LIBERTIES UNION, AND CONNECTICUT CIVIL LIBERTIES UNION, AMICI CURIAE

INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project of the ACLU Foundation is a special project of the ACLU dedicated to asserting and defending the

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* Letters of consent from the parties to the filing of this brief amici curiae have been filed with the Clerk of the Court.

rights of children. Central among those rights are the child's right to a stable home and to a parent-child relationship free from unwarranted state intrusion. The Children's Rights Project has participated in numerous cases throughout the United States involving the respective rights of parents and children in termination proceedings, as well as cases directed at improving conditions for children who have been removed from their homes and placed in the custody of the state.

The New York Civil Liberties Union and the Connecticut Civil Liberties Union are state affiliates of the ACLU.

STATEMENT OF THE CASE

The facts of the case are fully and adequately set forth in the Petition for Certiorari.

SUMMARY OF ARGUMENT

A long, uninterrupted line of decisions by this Court has held that the relationship between parent and child is of fundamental constitutional importance to parent and child alike. However, although the constitutional interests of children in proceedings to terminate parental rights are separate and distinct from those of parents, parent and child share an identical interest in assuring that fact-finding in termination cases be conducted in a fair and careful manner. (Point I.A.) Because the substantive standards applied in termination cases are necessarily vague, subjective, and elusive, raising the standard of proof is an especially important way of assuring careful, fair, and objective fact-finding. (Point I.B.)

No harm or risk of harm to legitimate state interests is implicated by requiring a "clear and convincing" standard in termination cases. No imminent harm to children already in the state's foster care system is occasioned by application of the standard, and New York, like most other states, has in fact declared that family reunification, not termination, is its own primary goal. Applying the "clear and convincing" standard imposes no new fiscal or administrative burden on the state, and the standard has in any event already been applied to proceedings with far less serious constitutional implications than these. (Point II)

Finally, certiorari may have been improvidently granted in this case due to the unsettled state of New York law. Cases

other than the one here on appeal have held that a "clear and convincing" standard is required by New York law, despite the contrary ruling here. (Point III)

ARGUMENT

I. THE JUDICIAL PROCESS MUST TAKE SPECIAL COGNIZANCE OF THE FUNDAMENTAL NATURE OF THE INTERESTS AT STAKE AND THE ELUSIVENESS OF THE SUBSTANTIVE STANDARD IN PARENTAL TERMINATION CASES

A. Parents and Children Share Separate But Coinciding Interests in Careful Fact-Finding in Proceedings to Terminate Parental Rights

This Court has long recognized that a compelling state interest is necessary to justify intrusion into a natural family and interference with the right of parents and children to maintain their relationship. Indeed, the Court has sometimes implied that even a compelling justification will not suffice, for

> "A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a 'private realm of family life which

> the state cannot enter.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). (Citations omitted.)" Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). (Emphasis added.)

On numerous occasions, the Court has held the family relationship to be the cornerstone of a set of inviolable "liberty interests" and the center of a constitutionally protected "zone of privacy." See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974).

A long line of the Court's decisions has particularly emphasized the fundamental constitutional significance of the relationship between parent and child. Quilloin v. Walcott, 434 U.S. 246, 255 (1978), citing, Wisconsin v. Yoder, 406

U.S. 205, 231-233 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). See also Parham v. J.R., 442 U.S. 584, 602-3 (1979). The Court has specifically recognized that a parent has a "primary freedom" to be with his or her child, Prince v. Massachusetts, 321 U.S. 158 (1944), and that such freedom is a "basic human right" antedating the Constitution. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 846 (1977). The Court has also made clear that the state may not limit the parent-child relationship "absent a powerful countervailing interest," even when that relationship has not previously been legitimated through the judicial process. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Although the constitutional right of family integrity has most often been used to insulate parental decisions from state review, see, e.g., Meyer v. Nebraska, supra; Skinner v. Oklahoma, supra; Cleveland Board of Education v. LaFleur, supra; Griswold v. Connecticut, supra; Roe v. Wade, supra; Stanley v. Illinois, supra; Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510, it is clear that children as well as parents have a fundamental stake in the preservation and autonomy of the family unit. As this Court stated in Stanley v. Illinois, 405 U.S. 645, 657 (1972), the right to family integrity is an "important interest of both parent and child". Accordingly, in Smith v. Organization of Foster Families For Equality and Reform, supra, at 844,

this Court stressed that the constitutional protection granted the family was based on the "emotional attachments that derive from the intimacy of daily association." Such intimate "emotional attachments" are necessarily reciprocal ones, in which each of the participants has a linked, but plainly separate, interest.*

It follows from these holdings, and the well-established rule that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967), that children have an interest which is separate and apart from the interest of their parents in termination proceedings.

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* See Duchesne v. Sugarman, 566 F.2d 817, 825 (2nd Cir. 1977); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala 1976).

In this case, however, those separate interests neatly--and completely--converge. The child's best interests as well as the parent's are better served by a careful, fair decision-making process when the continuation of the child's relationship with the parent is at stake. For the child, the consequences of any decision to terminate parental rights are severe and well-documented. When the decision is erroneous, those serious consequences are needless.

Studies have indicated that placing a child in state custody, regardless of the good intentions motivating the placement, frequently results in substantial psychological damage to the child.* It not only

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* See, e.g., Children Without Homes, (1978), survey of foster care, conducted by the Children's Defense Fund; Smith v. Organization of Foster Families, supra at 844.

means losing the constitutionally protected interest in the "emotional attachments that derive from the intimacy of daily association", but it also means being swept into the custody of a child welfare bureaucracy which acquires plenary power to make unreviewable decisions affecting all of the child's basic rights and needs. In theory, this enhanced state power has a benevolent purpose; in practice, it often has disastrous results. Moreover, theory and practice also diverge in another critical way. The placement of children in the custody of the state is intended to be only a temporary prelude to permanent adoption. In fact, studies have demonstrated that many -- perhaps most -- children whose parental relationships have been severed linger for years in foster care where they have no

parent at all.* Thus, even a benevolently motivated decision to terminate parental rights can end one trauma only to initiate others.

The significance of this Court's prior holdings to the issue now presented is therefore clear: given the truly fundamental nature of the individual liberty interests at stake in a determination to curtail parent-child liberties, and the importance of proper fact-finding concerning the ability and willingness of a particular parent to maintain a relationship with a particular child, courts must exercise extraordinary care in the fact-

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* See e.g. New Mexico Health and Social Services Department, In Limbo: A Study of New Mexico's Foster Care Children (January 1978); Kentucky Youth Advocates, The State To The Rescue; Securing Permanency for Foster Children (April 1980).

finding process whenever the curtailment of such liberties may result. Stanley v. Illinois, supra. Where the potential curtailment of the liberties is absolute and "terminal," as it is here, the constitutional interests at stake are at their greatest, and the most careful judicial protection of them is constitutionally required, Stanley v. Illinois, supra. The separate interests of parent and child completely coincide with respect to the importance of judicial caution and careful fact-finding in such proceedings.

B. Decisions To Terminate Parental Rights Are Usually Made On The Basis of Intrinsically Vague and Elusive Substantive Standards

The need for a rigorous standard of proof is heightened in parental termination cases by the inherently subjective nature

of the legal standards which are ordinarily applied. Cf. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) (3 judge court). "Success" and "failure" in child-rearing are simply incapable of objective definition. Whether or not the "fitness" standard is unconstitutionally vague because of this fact, see Doe v. Delaware, appeal dismissed for want of a properly presented federal question, 49 U.S.L.W. 4250 (U.S. March 9, 1981); Alsager v. District Court of Polk County, Iowa, supra, its substantive "looseness" is undeniable. Accordingly, this Court has specifically recognized in this area how difficult it is "to avoid decisions resting on subjective values", Smith v.

Organization of Foster Families, supra at 835, n.36. The unavoidable discretion and potential injustice which inescapably flow from such subjective evaluations can only be mitigated by taking exceptional procedural care.*

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* The "failure to plan" - despite - "diligent efforts" standard applied in this case further complicates the problems inherent in assessing parental fitness. Because the agency filing a termination petition in New York needs to demonstrate its own lack of responsibility for the parents' "failure to plan," it acquires of necessity a conflict of interest in its attempts to "speak for" the child. Because a finding of insufficient agency efforts can derail an agency's plan for a child, the agency acquires a separate interest of its own in the presentation of evidence at a termination proceeding. In New York, therefore, the substantive standard is not only broad, it is also subject to undiscernible manipulation. It is for reasons such as these that amici have previously urged the Court to require the appointment of separate counsel for children in all proceedings to terminate parental rights. See brief of Amicus Curiae ACLU Children's Rights Project in Doe v. Delaware, supra.

The elusiveness of these substantive standards assumes, moreover, an enlarged significance in view of the fact that when fundamental rights are absolutely threatened (as opposed to when lesser rights are merely limited), the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. Zablocki v. Redhail, 434 U.S. 374, 388 (1978). See also Shelton v. Tucker, 364 U.S. 479 (1960). The requirement that the state demonstrate that "a powerful countervailing interest" outweighs the rights and liberties affected by a proposed termination, Stanley v. Illinois, supra at 651, becomes difficult to enforce when the standards for assessing those interests are vague and intrinsically subjective. Although other,

less drastic, state interferences with family life may be based upon lesser showings, see e.g., Prince v. Massachusetts, supra, or be buttressed by fewer procedural safeguards, Parham v. J.R., supra, when the proposed state intrusion is permanent termination of the rights of parent and child to have any relationship at all, and when the declared aim of the state intervention is to promote the child's "best interests" as opposed to those of the parent, the state must meet a particularly heavy substantive and procedural burden, especially when the law presumes that parents do act in their children's best interest. Parham v. J.R., supra. When the substantive standard is uniquely difficult to purge of subjectivity and bias, requiring heightened

procedural safeguards is the only effective way to protect the serious and fundamental interests at stake.

II. DUE PROCESS REQUIRES THAT DECISIONS TO TERMINATE THE FAMILY RELATIONSHIP BE BASED UPON CLEAR AND CONVINCING EVIDENCE

In Addington v. Texas, 441 U.S. 418 (1979), which required a "clear and convincing" standard of proof in involuntary commitment proceedings, this Court reiterated its belief that a heightened standard of proof represents an important means of affording due process when fundamental liberties are implicated by a proposed state action.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error

> between the litigants and to indicate the relative importance attached to the ultimate decision." Addington v. Texas, supra at 423.

This Court has long recognized that the involuntary termination of a parent-child relationship is one of the most drastic of all state intrusions into individual privacy and liberty and of very high "relative importance". Consequently, involuntary termination decisions are, and long have been, surrounded by especially rigorous due process safeguards, both substantive and procedural. May v. Anderson, 345 U.S. 528 (1953); Armstrong v. Manzo, 380 U.S. 545 (1965); Stanley v. Illinois, supra.

In addition, all relevant considerations concerning allocation of the risk of error in the termination setting entirely support placing the risk of error on

the state. No significant state interest is jeopardized by application of the clear and convincing standard, while the interests of parents and children are grievously affected by erroneous decisions made under the mere preponderance standard.

New York plainly does have a parens patriae interest in protecting children from harm. But where, as here, there is no imminent danger to the children (who are already in foster care), no state interest arising from that aspect of its parens patriae power is furthered by a decision that is based upon a mere preponderance of the evidence. To the contrary, this Court has explicitly rejected the claim that the state's parens patriae interest in such proceedings is more important than the right of family integrity.

In Stanley v. Illinois, supra, at 652-53, the Court made clear,

> "that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."

Significantly, New York has declared that its primary interest is to preserve, not sever, natural family ties.* Although

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* For example, Section 384-b 1.(a)(ii) of the New York Social Services Law states:

> "[I]t is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home . . .."

Similarly, in Matter of Sanjivini K, 47 N.Y.2d 374 (1979), the New York Court of Appeals held that a mother's custody of her child could not be terminated on the sole ground that it was in the best interest of the child. The Court stated, at 382,

an erroneous decision to terminate parental rights destroys a family and deeply infringes fundamental rights, an erroneous decision not to terminate parental rights where the children are not in imminent danger merely errs in a direction which

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Footnote cont'd:

> "A child, of course, is not a parent's property, but neither is the child the property of the State . . . . In many cases the State may, and under some legal systems undoubtedly does, find 'better' parents for a child even though the natural parents may be willing and able to provide proper care. But it is fundamental to our legal and social system, that it is in the best interest of the child to be raised by his parents, unless the parents are unfit."

See also Matter of Corey L. v. Martin L., 45 N.Y.2d 383 (1978).

supports the state's own most fundamental goal. Moreover, as far as the family is concerned, a final decision to terminate the parent-child relationship cannot later be reopened, even if clearly erroneous. The state, however, can always gather further evidence for a second petition to terminate the family relationship, if such evidence exists, and eventually achieve its goal. Indeed, that is precisely what happened here. As the Court held in Addington, supra, at 427, under such circumstances

> "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."

This disparity of risk does not in any way diminish if an asserted state interest in the adoption of the children

is considered. New York's Court of Appeals has repeatedly held that despite the state's interest in facilitating adoption for children, the termination standards must be strictly applied with rigorous procedural and substantive protections accorded to all parties. See, e.g., Matter of Sanjivini K, supra. In fact, a New York Family Court judge has recently ruled that the standard of proof at issue in this case is too low to satisfy due process and has read Family Court Act § 622 to require a "clear and convincing" standard. (See Point III, infra.) No state interest in seeking permanent adoptive homes for children in its care is disturbed by requiring that

termination decisions be based upon clear and convincing evidence.

Moreover, the use of the clear and convincing standard as an element of due process, unlike other procedural safeguards such as right to counsel or right to a hearing, does not impose any additional fiscal or administrative burdens on the state. Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Nor does a higher standard of proof interfere with the speed and flexibility of individual Family Court procedures, or otherwise deeply affect the structure of the proceedings. Rather, it provides a nondisruptive, yet quite direct, means of "impressing the factfinder with the importance of the decision" to terminate a

parent-child relationship. Addington v. Texas, supra at 427.

Finally, the nature of a termination proceeding, as well as the interests which it infringes, further demonstrates the necessity of more than the evidentiary minimum. A termination proceeding, like the civil commitment proceeding at issue in Addington v. Texas, supra, though nominally civil, involves a state-initiated effort to deprive a private person of a fundamental liberty. In such situations, a standard greater than mere preponderance has regularly been held to apply. See, e.g., In re Winship, supra. Moreover, although termination does not involve a restriction on liberty precisely analogous to incarceration or confinement in a mental institution, it is a

permanent, rather than temporary, step,* and it also necessarily involves a finding of fault and the stigmatization such a finding ensures. In any event, neither the absence of such confinement, nor the fact that the proceeding is nominally civil, determines the standard of proof, and the Court has previously recognized the need for a higher standard of proof in several other instances where the

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* Lower courts have found the fact that termination of the family relationship, unlike temporary removal of a child, is permanent and irreversible, to be critical to determining what process is due. See Legal Distinction between Custody and Termination Orders in Child Neglect Cases, 7 J. Fam. L. 66 (1967). In one such case, Newton v. Burgin, 363 F. Supp. 782, 785-6 (W.D.N.C. 1973), the court distinguished between the procedural safeguards necessary before the state can remove a child in an emergency for a temporary time, in that case five days, and the greater procedural safeguards necessary in proceedings to terminate the family relationship permanently.

result of a nominally "civil" proceeding brought by the government may be particularly severe, Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) (deportation); Schneiderman v. United States, 320 U.S. 118 (1943) (denaturalization), or the ultimate decision is likely to be less than wholly reliable due to either the nature of the evidence presented or the vagueness of the substantive standard to be applied. Many such situations involve rights far less fundamental than those at stake in this case.*

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* Clear and convincing evidence has traditionally been required for proof of fraud, 9 Wigmore, Evidence § 2498 (3rd Ed. 1940); Accord Woodby v. Immigration and Naturalization Service, 385 U S. 276, 285 n.18 (1966); Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970), cert. denied, 400 U.S. 878 (1970) (district court erred in applying preponderance standard to proof of patent fraud), and in proceedings to disbar attorneys, In re Fisher, 179 F.2d 361, 369-70 (7th Cir.), cert. denied, 340 U.S. 825 (1950).

Interestingly, New York itself requires the paternity of an illegitimate child to be proved by clear and convincing evidence. Lopez v. Sanchez, 34 N.Y.2d 662 (1974); Matter of Dorn "HH" v. Lawrence "II", 31 N.Y.2d 154 (1972), appeal dismissed for want of a substantial federal question, sub nom. Fuchs v. Silvester, 409 U.S. 1121 (1973). If attributing parenthood involuntarily to an individual is considered a sufficiently serious infringement of personal liberty to require clear and convincing evidence, under the Equal Protection Clause involuntary severance of the parent-child tie, deserves -- at least -- the same treatment. Erroneous determinations of paternity can always be reversed if new evidence comes to light. "Termination," by definition, cannot.

Although the State makes much of Vance v. Terrazas, 444 U.S. 252 (1980), that decision does not support the result below. In Vance, this Court held:

> ". . . expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence." Id. at 267 (100 S. Ct. at 548).

No similarly rigorous substantive showing is required here. Under New York law, the family relationship is terminated on a showing that it is "more probable than not" that parents have failed to plan for the future of their child during the time the child is in foster care and that the state has "more probably than not" tried diligently to help them make plans. That substantive standard for termination of

parental rights is flexible and open-ended, perhaps intentionally, and allows the state great latitide in presenting evidence. It does not in any way go to, nor require any proof concerning, the parent's state of mind. By contrast, a substantive standard comparable to the one involved in Vance would in these circumstances require a showing that the family members had intentionally renounced the family relationship, as is in fact required in emancipation or divorce proceedings. Because the substantive standard are so vastly different, Vance is not controlling. Certainly nothing in Vance demands automatic judicial deference to any standard of proof the legislature might impose.

To the contrary, courts will accept the legislature's choice of the standard

of proof only if there are no "countervailing constitutional constraints." Steadman v. SEC, 49 U.S.L.W. 4174, 4175 (U.S. February 25, 1981). When such considerations are present the question of how much process is due under the Constitution is one for the courts, not for the legislature. Arnett v. Kennedy, 416 U.S. 134, 167 (Powell, J., concurring) (1974). This is such a case because of the important interests at stake and the inescapably subjective standards by which those interests are weighed. Accordingly, this Court should hold that the tie between a parent and child may not be permanently severed unless the state establishes its case by "clear and convincing evidence." Any lesser standard would seriously subvert the notion of family integrity which this Court has so consistently and steadfastly guarded.

III. CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE OF UNCERTAINTY IN UNDERLYING STATE LAW

Although amici strongly believe that application of the "clear and convincing" standard to termination proceedings is required by the federal due process clause, there is a strong possibility that the same result is also, and separately, required by the law of New York. Since the Appellate Division, Third Department, rendered the decision on appeal here, a distinguished Family Court located in another Department has concluded that the New York statute in question requires that courts apply the "clear and convincing" standard to parental termination cases. See In The Matter

of Marilyn H., Docket No. B-276/80, Family Court, City of New York, Feb. 24, 1981 (Dembitz, J.). Thus, with an incipient split and contradiction among New York's jurisdictionally separate Departments, a resolution of this issue by the New York Court of Appeals may be anticipated. Were the New York Court of Appeals to rule that the New York Statute requires clear and convincing evidence, it would not be necessary for this Court to decide whether the contention requires that result. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 (1936) (Brandeis, J., Concurring in part and dissenting in part).

CONCLUSION

For the reasons set forth above, the judgment appealed from should be reversed, and the case remanded for reconsideration by the trial court under the "clear and convincing" standard. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

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Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5889

IN THE

Supreme Court of the United States

October Term, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

against

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK.

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Question Presented.

Whether section 622 of the New York Family Court Act affords parent and child due process by providing for "a fair preponderance of the evidence" as the standard of proof in a proceeding to terminate parental rights based on permanent neglect?

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No. 80-5889

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

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BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

Brief *Amicus Curiae* of the Attorney General of the State of New York.

Interest of *Amicus Curiae.*

The Attorney General submits this *amicus curiae* brief pursuant to Rule 36(4) of the Rules of this Court in support of the constitutionality of section 622 of the New York State Family Court Act. The Attorney General had heretofore pursuant to New York Executive Law, § 71,

submitted a brief to the Supreme Court of the State of New York, Appellate Division, Third Department, in support of the constitutionality of section 622 of the Family Court Act.

Summary of Argument.

In the State of New York, thousands of children were in foster care* for lengthy periods of time. Their parents did not want them but would not consent to their adoption. The parents' consent could only be dispensed with by a finding of abandonment which was most difficult to establish.

To further the best interests, needs and rights of children, the Legislature enacted the Permanent Neglect Statute here under review.

Under the statute, the State's first obligation was to reunite the child with the natural parent. Where positive nurturing parent-child relationships no longer existed, a proceeding to terminate parental rights and free the child for adoption was to be commenced.

The allegations of the petition* must be supported by a fair preponderance of the evidence (Family Court Act, § 622).

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*In its decision in *Smith v. Organ. of Foster Families for E. & Reform*, 431 US 816 (1977), this Court outlines in detail the present New York statutory system regulating foster care and throughout the decision refers to various statistical studies, reports, law review articles and opinions of noted text writers on child care services. See, also, *Child v. Beame*, 412 F Supp 593 (SDNY, 1976).

*Family Court Act, § 614 requires that the petition allege (a) child under 18 years of age; (b) child is in the care of an authorized agency; (c) the agency has made diligent efforts to encourage the parental relationship; and (d) the parent notwithstanding the agency's efforts has failed for a period of more than one year following the date the child came into the agency to substantially and continuously or repeatedly maintain contact with or plan for the future of the child although physically and financially able to do so.

Custody proceedings are more a matter of State concern than Federal. The State acts within its constitutional power when it regulates procedures concerning the burden of proof.

Children have constitutional rights which are entitled to due process protection under the Fourteenth Amendment.

In custody proceedings the Court must strike a balance between the rights of the parents and the rights of the child. Each is entitled to due process. "Fundamental fairness" to each can only be achieved by adoption of the preponderance standard of proof.

Statutory Framework.

Parental rights can be terminated in New York by approving adoption by another person (New York Domestic Relations Law [DRL], § 117) or by granting guardianship and custody to a person who will then be able to consent to the child's adoption (DRL, § 111[1] [f], New York Social Services Law [SSL], § 384-b[1][b], [8]) or by a permanent neglect proceeding such as the present one (Family Court Act [FCA] Art 6, Pt 1, §§ 611-34, SSL, § 384-b).

As for adoption, the consent of each living natural parent is necessary unless the parent has abandoned, surrendered or waived all rights to the child, DRL, § 111 (2) (a)-(b), (f), or is a convicted felon whose civil rights have not been restored, DRL, § 111(2) (d), or due to mental disability is now and for the foreseeable future will be unable to provide proper care for the child, DRL, § 111(2) (e), or has had his or her rights terminated pursuant to SSL, § 384-b. In virtually all cases involving children over fourteen years of age, the Court requires the child's consent, see DRL, § 111(1) (a). Except by cross reference to SSL, § 384-b, the adoption statutes do not state the stand-

ard of proof for determining when a parent's consent can be dispensed with. The ultimate decision to grant adoption is based on being "satisfied that the best interests of the adoptive child will be promoted thereby * * *" DRL, § 114. See DRL, §§ 115(1), 116(4). See, also, DRL, § 115-a(4).

Guardianship and custody terminating parental rights may be awarded by either the Family or Surrogate's Court based on the parent's death or abandonment. SSL, §§ 384-b(3) (d), (4) (a)-(b). Only the Family Court may terminate rights based on a finding of unfitness due to mental disability or, as in the present case, "permanent neglect". SSL, §§ 384-b(3) (d), (4) (c)-(d). (Ordinary neglect is defined in FCA, § 1012, SSL, § 412, and is a basis for removing a child but not for terminating parental rights.) The wishes of a child over fourteen years old will usually be considered. SSL, § 384-b(3) (k). The standard of proof in mental disability unfitness cases is "clear and convincing proof", while the standard in permanent neglect, abandonment and parental death cases is "a fair preponderance of the evidence * * *." SSL, § 384-b(3) (g). The ultimate decision to terminate is based on the child's best interests. SSL, § 384-b(1) (b), (3) (k).

Permanent neglect proceedings such as the present one are governed by New York Family Court Act, Art. 6, Pt 1 (§§ 611-34), SSL, § 384-b and FCA Art. 1, 2 and 11 to the extent the latter do not conflict with SSL, § 384-b. Parents have the right to counsel and to have counsel assigned to them if indigent. Family Court Act, § 262(a) (iv). The Court will appoint a law guardian (attorney) for the child "if independent legal representation is not available to such minor." *Id.*, § 249(a). The statute provides for two hearings, the first of which is a fact-finding hearing to determine whether the child is permanently neglected and a second dispositional hearing to determine what disposi-

tion should be made in accordance with the best interests of the child. Only competent, material and relevant evidence may be admitted in the fact-finding hearing, *id.*, 624. The allegations of the petition must be supported by a fair preponderance of the evidence, *id.*, 622.

The dispositional hearing determines whether "the best interests of the child" would be served by dismissing the petition, by suspending judgment for up to two years, or by terminating parental rights. *Id.*, §§ 614(1) (e), 623, 631. No specific standard of proof is set. Evidence must be material and relevant but hearsay and evidence about events subsequent to the commencement of the proceeding are admissible. FCA, § 624. The hearing itself can be waived if all consent and a dispositional order entered based on the evidence at fact-finding and the probation service report. *Id.*, § 625.

ARGUMENT.

Section 622 of the Family Court Act of the State of New York does not violate the due process clause of the Fourteenth Amendment of the United States Constitution by utilizing a fair preponderance of the evidence as the standard of proof in a permanent neglect proceeding.

A. Framework for Review.

The framework for review of the adequacy under due process of the standard of proof in New York's statutory scheme for terminating parental rights based on permanent neglect is set forth in last Term's decision involving the parents' right to counsel under North Carolina's termination law, *Lassiter v. Dept. of Social Services*, ____ US ____, 49 USLW 4586 (June 1, 1981). The Court unanimously agreed, *id.*, 49 USLW 4588 (Stewart, J.); *id.*,

4590, 4591 (Blackmun, J., dissenting); *id.*, 4597 (Stevens, J., dissenting), that the constitutionality under due process of parental right termination proceedings is to be analyzed by a balancing of the factors set out in *Mathews v. Eldridge*, 424 US 319, 335 (1976): the State's interest, the private party's interest, and the risk of error caused by the procedures used.

The *Lassiter* majority summarized its discussion of the *Eldridge* factors as follows, *id.* at 4589:

> "the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high."

After balancing the *Eldridge* factors, the Court found that the constitutional right to counsel should be determined on a case by case basis. *Ibid.* It noted that the states were free to provide counsel by statute and that many of them had done so. *Id.* at 4590.

B. Application of *Eldridge* and *Lassiter* to New York Permanent Neglect Proceedings.

As in *Lassiter*, the parent's interest in procedural provisions of New York's permanent neglect laws is an extremely important one due to his or her constitutional rights to

rear the child, while possible criminal liability, relevant in *Lassiter,* is not affected by the standard of proof at fact-finding. As in *Lassiter,* here, too, "the State has an urgent interest in the welfare of the child ... ", 49 USLW at 4588. As will be shown, this interest is based on both pecuniary (foster care is expensive) and *parens patriae* [see SSL § 384-b(1) (b)] considerations. This interest coincides with the parent's insofar as the parent also wishes "an accurate and just decision", *ibid.* But where the parent is unfit and his rights should be terminated, then the parent's interests may be served by an unrealistically high standard of proof that will prevent the State from proving its case while the interests of the State and of the child require the lowest standard of proof compatible with accuracy. As to the risk of an erroneous decision extensive factual inquiry conducted under State auspices into experience under the permanent neglect statute provided abundant evidence (see "D" *infra*) that under the preponderance standard the risk of error still ran considerably in favor of the parent and against the child and the State.

C. New York Law Prior to 1976

The legislative history of New York's permanent neglect law demonstrates that the preponderance standard was initially chosen and later reaffirmed by the Legislature to reduce the number of cases in which parental rights were inappropriately *not* terminated. The statute was enacted about twenty years ago, reflecting, "increasing concern about the interests of the child as distinct from those of the parent," N.Y. Temporary State Commission on Child Welfare, *[The Children of the State], Barriers to the Freeing of Children for Adoption* (hereinafter "*Barriers*") (March 1976), p 11, and based on continuing reports that thousands of children in New York State were in perpetual foster care because their natural parents would neither take them back into their homes nor consent to their adop-

tion.* Only by a finding that the parent had abandoned the child could the child be adopted without the parent's consent. Such a finding, however, required acts so unequivocal as to bear one interpretation and one only, that the parent manifested an intention to abandon the child forever (*Matter of Bistany*, 239 NY 19, 24 [1924]). He, who would attempt to prove abandonment, bore a very heavy burden. At that time, there existed no separate judicial proceeding to terminate parental rights.**

In 1959, the Legislature of the State of New York enacted its first "Permanent Neglect Statute". In *Matter of Anonymous (St. Christopher's Home)*, 40 NY2d 96 (1976), the Court of Appeals concisely reviews the historical background leading to the enactment of the Permanent Neglect Statute as follows (100, 101):

> "The origin of the guardianship and custody proceeding can be traced to chapter 438 of the Laws of 1884. Even then parental rights were subject to termination, guardianship and custody to be assumed by an agency upon a finding of abandonment. Such a finding required a showing of acts so unequivocal as to bear one interpretation and one only, that the parents manifested an intention to abandon their child forever (*Matter of Bistany*, 239 NY 19, 24) or, as it was phrased in *Matter of Maxwell* (4 NY2d 429, 433), 'a settled purpose to be rid of all parental obligations and to forego all parental rights', no lesser showing being sufficient. Such a heavy burden was deemed appropriate 'since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court'

---

*Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 St. John's L Rev 215, 218 (1971) (hereinafter "Gordon").

**Gordon, p 230.

(*People ex rel. Portnoy v. Strasser,* 303 NY 539, 542; *Meyer v. Nebraska,* 262 US 390, 399.)

"Adoption, unknown to the common law, exists solely by statute (*Betz v. Horr,* 276 NY 83, 86-87; *Matter of Thorne,* 155 NY 140, 143). The first general statutory provision covering adoption was chapter 830 of the Laws of 1873. Then, as now, parental consent was necessary with few exceptions, one among them being abandonment (L 1873, ch 830, § 11; Domestic Relations Law, § 111, subd 4).

"In 1959 the Legislature recognized the existence of a serious situation which had resulted from the stringent test set for the finding of abandonment. This situation was compounded by the necessity for such a finding of abandonment, absent parental consent, in the adoption process. In the memorandum of the Citizen's Committee for Children of New York City, Inc., which was incorporated into the Legislature's report, it was noted that section 384 of the Social Services Law (formerly entitled Social Welfare Law) in providing for the termination of parental rights 'makes no provision for the vastly greater number of children who, though not "abandoned" in the legal sense, have been abandoned in every other sense and are doomed to live in foster homes or institutions because the natural parents are unwilling to provide them with a family life even though able to do so and even though given every assistance by social agencies. Recent studies disclose that there are thousands of children in foster homes or institutions where they have been placed by their natural parents or by orders of the children's courts, who grow up with only the barest of contact with their natural parents. * * *' "

The legislation recognizes the existence of two rights—the parents' and the child's. In his Memorandum of approval (1959 McKinney's Session Laws, p 1750), the Governor stated "These procedures recognize a parent's right with respect to his child, but at the same time recognize a child's right to have every opportunity for normal family affection and care." Adoption of the preponderance of evidence standard of proof reflects a "fundamental value determination" (*In re Winship*, 397 US 358, 372 [1969]) by the legislature that a child's right is equal to the parent's right. This standard of proof affords due process to both parent and child. "Fundamental fairness"* to each is achieved by not tipping the scales of justice in favor of one over the other.

That a child, as well as an adult, is constitutionally entitled to due process under the Fourteenth Amendment cannot be questioned. This Court has so held. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e.g.*, *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967)." *Planned Parenthood of Central Missouri, et al. v. Danforth, Attorney General of Missouri, et al.*, 428 US 52 (1975). See also, *Parham v. J.R.*, 442 US 584 (1978).

D. The 1976 Recodification.

Far from resulting in inappropriate termination of parental rights because the standard of proof was too low, the permanent neglect statute of 1959 failed to free children for adoption in an efficient timely manner. *Bar-*

Lassiter v. Department of Social Services, ___ US ___, 49 USLW 4586, 4587.

riers, pp i-ii, 17. Following an intensive year-long statewide empirical study and consultation with experts, *Barriers,* pp iii-vii, 17-18, the Legislature recodified the permanent neglect laws, L 1976, ch 666.

While the legislation did not confer any right on a child to be freed promptly for adoption, the legislative findings of SSL § 384-b(1) recognized that many children do remain longer than they should in foster care, *Barriers,* p 21. See *Smith v. Organization of Foster Families,* 431 US 816, 835, n 37 (1977). The Legislature explicitly attempted in the new law both to protect "the rights of the natural parents" and to further "the best interests, needs, and rights of the child", SSL § 384-b(1) (b).

The preponderance standard was preserved for permanent neglect because the Legislature found that the courts were applying with extreme rigor the statutory definitions of the items which had to be proved. Even where parental interests were flickering and lacked substance, parental rights could not be terminated. *Barriers,* pp 13-16. The standard of proof may have been defined as a preponderance but in practice it was far higher.

As part of the recodification, the Legislature elaborated the definitions of the items to be proved in permanent neglect cases ["diligent efforts", "contact", "plan", see SSL § 384-b(7)] and even specifically forbade considering certain factors [adoptability, see SSL § 384-3(i)] based on its study of how to free children for adoption who should be freed. *Barriers,* pp 23-27, 32-6, 49-50. With all experience showing that the risk of error ran considerably in favor of the parent and against the child and the State, a number of authorities suggested that once the petitioner

produced a preponderance of evidence for permanent neglect, the burden of proof be shifted to the respondent parent to show why rights should *not* be terminated.* *Barriers,* pp 27-31. The Legislature declined to shift the burden or change the standard of proof at fact-finding or dispositional permanent neglect hearings. Rather, it adjusted the factors to be proved as a way of producing more accurate and just results.

By way of contrast, when the Legislature created new grounds for termination on unfitness due to mental disability (L 1973, ch 863; L 1975, ch 706, enacting former SSL § 384[7], repealed and recodified as SSL § 384[7], repealed and recodified as SSL § 384-b[4] [c] by L 1976, ch 666), it provided a higher standard of proof, to wit, clear and convincing evidence. The recodifers were well aware of the contrast, *Barriers,* pp 5-6, and preserved it. Moreover, when the recodification drafters proposed for the first time to allow termination in ordinary neglect proceedings (there were to be two grounds, child abuse amounting to a depraved indifference to human life and repeated child abuse without foreseeable rehabilitation), they again proposed a clear and convincing standard. *Barriers,* pp 40-42.**

*Similar proposals were advanced by legal commentators. See Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights* 28 Stanford L Rev 623, 705-6 (1976), and were adopted by the Juvenile Justice Standards Project, although not by its sponsors.

**The difference in the standards proposed is clearly based in part on the fact that the grounds are new, without the baggage of excessively restrictive interpretations. The other cause is that one child abuse ground called for proof of manslaughter, an act that would clearly be taken to criminal court. The other proposed ground, like the existing mental disability ground, called for prediction as to the foreseeability of recovery, something which was sufficiently and inherently uncertain that the Legislature chose to require anyone seeking termination based on such a prediction to produce more proof than usual.

E. Experience of Other Jurisdictions.

In 1974, more states had statutes applying their usual civil procedure standard of proof, usually explicitly referred to as a preponderance, in termination cases than had clear and convincing as the standard. See Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 Fam L Q 1, 48-49 (Table X), 66-8 (1975). As shown by petitioners' tabulation of current statutes and by the dates of the cases setting standards in the absence of statutes, it appears that the situation has changed and that there is a recent trend as a matter of policy to develop higher standards of proof. Mere prevalence does not, however, imply that the standard is *necessary* for due process, *Lassiter v. Dept. of Social Services, supra,* 49 USLW at 4590, and indeed, the very newness of the development suggests that having the higher standard applied is not a tradational, fundamental constitutional value for due process purposes. See note, "Developments in the Law—The Constitution and the Family", 93 Harv L Rev 1156, 1177-87 (1980).

F. The Preponderance Standard Adequately Protects Petitioners' due process Rights and the State's Interests in the Rights of the Child.

The New York Court of Appeals in *Matter of Bennett v. Jeffreys,* 40 NY2d 543 (1976), as a predicate to its conclusion that children, as well as parents, have rights (*id.,* p 548), stated (p 546):

> "that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude [cit om]."

Not only does the State of New York have an interest in the well being of its children, it has a duty to protect them and "to see that they are 'safeguarded from abuses' which might prevent their 'growth into free citizens.' " (*Ginsberg v. State of New York,* 390 US 629, 640 [1968].)

In *Patterson v. New York,* 432 US 197 (1977), this Court upheld New York's rule of evidence of placing on the defendant the burden of proving by preponderance of the evidence the affirmative defense of extreme emotional disturbance when charged with the crime of second degree murder. In *Patterson,* this Court held (*supra,* pp 201, 202):

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California,* 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall,* 357 U.S. 513, 523 (1958); *Leland v. Oregon,* 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)."

Just as preventing and dealing with crime is much more the business of the State than it is of the Federal government; so is parent-child custody much more the business of the State than that of the Federal government. This Court should give the widest deference to New York's legislative judgment that attempts to solve the problem with which the State was confronted "the plight of thousands of forsaken children whose parents had abandoned their responsibilities for care and support", *Matter of Klug,* 32 AD2d 915, 916 (1st Dept, 1969); *In re Gault, supra,* p 70.

The petitioners' contention that the burden of proof in a parent-child custody proceeding should be "convincing" is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Patterson v. New York, supra,* p 202.) Most recently, this Court has upheld the power of Congress to utilize the "preponderance" rule in loss of citizenship cases. In *Vance v. Terrazas,* 444 US 252 (1980), the Court held (pp 264, 266) as follows:

> "With respect to the principal issues before it, the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be clear and convincing evidence rather than by the preponderance standard prescribed in § 1481(c). We are in fundamental disagreement with these conclusions.
>
> * * *
>
> "We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth

> Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Addington v. Texas,* ____ U.S. ____ (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa v. United States, supra.* But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby v. Immigration Service,* 385 U.S. 276, 285 (1966) (deportation); *Schneiderman v. United States,* 320 U.S. 118, 125 (1943) (denaturalization). None of these cases involved a congressional judgment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence."

Although this Court may evince a "decided preference for requring clear and convincing evidence", it should not impose such preference on the State of New York which has expressed its legislative judgment that "the preponderance standard of proof provides sufficient pro-

tection for the interests" (*Vance v. Terrazas, supra,* p 266) of both the parent and the child in a custody proceeding.

If, as this Court holds, "due process" expresses the requirement of fundamental fairness; if children who have been forsaken by their natural parents, who have abandoned their responsibilites for their children's care and support, are ever to achieve "what should be their [his] birthright: a responsible and affectionate parental relationship—'a happy home and the love and affection to which all children are entitled.' " (*Matter of Jones,* 59 Misc 2d 69, 74 [Family Court, New York County, 1969]); if these children's rights are to be recognized, then "fundamental fairness" dictates that the preponderance of evidence rule be adopted as the standard of proof.

CONCLUSION.

The order and judgment of the Supreme Court of the State of New York, Appellate Division, Third Department, should be affirmed.

Dated: Albany, New York
July 31, 1981

Respectfully submitted,

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No. 80-5889

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

—against—

BERNARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC., M.F.Y. LEGAL SERVICES, INC., AND BROOKLYN LEGAL SERVICES CORPORATION, A.

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POINT I

DUE PROCESS REQUIRES A CLEAR AND CONVINCING STANDARD OF PROOF IN PROCEEDINGS FOR TERMINATION OF PARENTAL RIGHTS .....

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Community Action for Legal Services, Inc., MFY Legal Services, Inc., and Brooklyn Legal Services Corporation A, respectfully move, pursuant to Rule 36 of this Court's Rules, for permission to file the within brief Amicus Curiae in Santosky v. Bernardt S. Kramer, Commissioner of Ulster County Department of Social Services, by reason of the Amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the issues presented herein.

The attorneys for all parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Petitioner and Respondent have granted their consent.*

*Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Community Action for Legal Services, Inc. is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than, 40,000 persons a year. CALS attorneys provide representation in all the trial courts in New York City, in the State and Federal Appellate Courts and in this Court. MFY Legal Services, Inc. and Brooklyn Legal Services, Corporation A,

are two of CALS' delegate corporations. Their neighborhood offices are located in the lower East Side and the West Side of Manhattan and in the Williamsburg section of Brooklyn, New York respectively. Both programs have an active family law practice.

Approximately 20% of the cases handled by CALS neighborhood legal services offices, including MFY Legal Services, Inc. and Brooklyn Legal Services Corporation A are in the area of family law. These cases include a significant number involving the termination of parental rights in the Family Court of the State of New York -- at least 1,000 cases since 1967.

Attorneys associated with CALS, as well as MFY Legal Services, Inc. and Brooklyn Legal Services, Corporation have handled many reported cases involving

termination proceedings and related areas of family law, including Smith v. Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents); Shelton v. Smith, 422 F. Sup.; 460 (E.D.N.Y. 1976) aff'd, 547 F. 2d 768 (2d Cir. 1976) (termination of visitation between parents and children in foster care without due process); Matter of Ray A.M., 37 N.Y. 2d 103 (1976) (termination of parental rights).

The constitutional question raised by the instant appeal, namely whether due process requires that a judicial order involuntarily terminaging parental rights must be supported by clear and convincing evidence is one of central concern to Community Action for Legal Services Inc., and its delegates. In fact attorneys from

MFY Legal Services, Inc. and Brooklyn Legal Services Corporation A have litigated this precise issue in the Family Court of the State of New York in Matter of Orzo, 84 Misc. 2d 482, 374 N.Y.S. 2d 534 (Fam. Ct., N.Y. Co., 1975); In the Matter of Marilyn H., ___ 2d Misc. 2d ___, ___ 436 N.Y.S. 2d 814 (Fam. Ct., N.Y. Co. 1981).

Accordingly, Amici wish to submit their brief because of their concern about the impact of this case on their clients and because they hope to be able to present to the court an analysis of the issues from the standpoint of the indigent parent which may not otherwise be presented.

Wherefore, Community Action for Legal Services, Inc., MFY Legal Services, Inc., and Brooklyn Legal Services, Corporation A respectfully request leave to file the attached brief as Amici Curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF
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LEGAL SERVICES, CORPORATION A

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INTEREST OF AMICI CURIAE

The interest of Amici Curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case is before this court as a result of the issuance of a writ of certiorari to review a decision of the Supreme Court of the State of New York, Appellate Division, Third Department, issued May 1, 1980, which affirmed the decision of the Family Court of Ulster County, New York, dated April 5, 1979. The Family Court found three of petitioners' children to have been permanently neglected by petitioners and ordered petitioners' parental rights to those children permanently terminated.

Petitioners, John and Annie Santosky, are husband and wife and the parents of five children. The oldest child, Tina Frances Apel, was found to have been neglected by her parents in 1973 and was placed in foster care. At the time of the Family Court's decision, she was seven years old and had been in foster care for five years. John and Jed Santosky, the

next two children, were found to be neglected in 1974 and were also placed in foster care. At the time of the hearing they were 5 and 4 years old and had been in foster care about four years. The Santosky's fourth child was born in 1978, and the fifth in 1979. The younger two children live at home with their parents, as they always have.

Throughout the period that the three older children have been in foster care, the Santoskys have visited them regularly, as often as the agency would allow. In 1977 the agency tried for a time to stop the visits on the grounds that they were confusing to the children, but the Family Court, on the Santosky's application, ordered the visits resumed. The Santoskys did apparently have trouble getting along with the various professionals who tried on behalf of the agency to help them. The workers claimed to find the

Santoskys passive, suspicious, and uncooperative.

On October 16, 1978 respondent filed a petition in the Ulster County Family Court seeking to terminate the Santosky's parental rights to the three older children on the grounds of permanent neglect. On March 12, 1979, after a fact-finding hearing, the Court found permanent neglect. On April 5, 1979, after a dispositional hearing, the court terminated the Santoskys' parental rights.

Petitioners appealed immediately to the New York Court of Appeals, on the sole grounds that New York's statute on termination of parental rights was unconstitutional in that it permitted a finding of permanent neglect upon a "fair preponderance of the evidence", rather than "clear and convincing evidence." On April 14, 1979 the Court of Appeals referred the appeal to the Appellate Division of the

New York Supreme Court, Third Department. The Appellate Division reviewed the record and them affirmed the Family Court's judgment, basing its decision solely on the constitutional issue. Petitioners' second appeal to the New York Court of Appeals was dismissed on September 16, 1980 on the grounds that the case presented no substantial constitutional question. Petitioners then petitioned this court for a writ of certiorari.

QUESTION PRESENTED

Whether Section 622 of the Family Court Act of the State of New York is unconstitutional under the Due Process Clause of the Fourteenth Amendment because it permits the Family Court to terminate parental rights on a finding of permanent neglect which is based upon a "fair preponderance of the evidence"

SUMMARY OF ARGUMENT

A proceeding for termination of parental rights results in the ultimate deprivation of a fundamental civil right: thr right of a parent to the "care, custodv, management and compdnionshio of her minor child" May v. Anderson, 345 U.S. 528, 533 (1953). Termination of parental rights has been likened to the death penalty.

The New York Family Court Act §§614, 622 and New York Social Services Law §384-b.7 provide for the termination of parental rights to a child upon a finding of "permanent neglect" supported by "a fair preponderance of the evidence."

The interests of both the parent and child in this termination proceeding derive from the constitutional right which attaches to the family unit.

The interests of the parent and child in their relationship to one another continue

and are not in conflict until after a finding of permanent neglect has been made and until then the State has no independent interest in termination.

The nature of the permanent neglect statute and the way it is applied makes the risk of an erroneous deprivation extremely high. The sources of this risk are the broad and indefinite terms of the statute, the imposition of the statute's requirements on a retroactive basis and the dichotomy which exists between permanent neglect as a legal construct and the real situation of parents and their children in the context of the malfunctioning foster care system.

Due process can only be satisfied in these proceedings by requiring a clear and convincing standard of proof. This Courts decisions fully support the conclusion that this standard must be applied.

DUE PROCESS REQUIRES A CLEAR AND CONVINCING STANDARD OF PROOF IN PROCEEDINGS FOR TERMINATION OF PARENTAL RIGHTS

A. INTRODUCTION

Petitioners contend that New York State has deprived them of all their fundamental rights as parents without due process of law. when if found that their children were "permanently neglected" on the basis or a mere "fair preponderance of the evidence." Amici are submitting this brief in order to assist the Court in making its assessment of

> first the private interest that will be affected by the official action, second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Amici believe that the "preponderance of the evidence" standard is constitutionally inadequate and that due process requires a "clear and convincing" standard of proof in proceedings for termination of parental rights.

B. THE NATURE OF THE PERMANENT NEGLECT PROCEEDING

New York Family Court Act §§614, 622 and New York Social Services Law §384-b govern the termination of parental rights to a child based upon "permanent neglect." Pursuant to Social Services Law §384-b.7 (a) a permanently neglected child is defined as

> ...a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, nonwithstanding, the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.*

A finding of permanent neglect under this section need only be based upon "a fair preponderance of the evidence." F.C.A. §622,

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* The substantive law of permanent neglect is set out in N.Y.S.S.L. §384-b.7; the procedure in N.Y.F.C.A.; Article 6, Part 1, §611 et seq.

Matter of Orzo, 84 Misc. 2d 482, 374 N.Y.S. 2d 554 (Fam. Ct., N.Y. Co., 1975); Cf. Matter of Marilyn H. ___ Misc. 2d ___, 436 N.Y.S. 2d 814 (Fam. Ct., N.Y. Co., 1981). *

In considering the proof necessary for such a finding the courts need not limit the one year failure to plan or failure to maintain contact to any particular year. Matter of Shantal, 68 A.D. 2d 482, 483, 486, 417 N.Y.S. 2d 696 (1st Dept., 1979); Matter of Melanie, 76 A.D. 2d 1008, 1009, 492 N.Y.S. 2d 773 (3rd Dept., 1980); Matter of Marilyn H., supra. Similarly, the one year period need not be the year immediately preceding the filing of the petition. Matter of Jones, 59 Misc. 2d 69, 71, 297 N.Y.S. 2d 675 (Fam. Ct., N.Y. Co., 1969). Further, the failure to plan for and the failure to maintain contact with the child are considered in the disjunctive; either

* Following this finding a dispositional hearing is held, F.C.A.§623, to consider the child's best interest, without consideration of parental rights, F.C.A.§631.

is sufficient for a finding of permanent neglect In re Orlando F., 40 N.Y. 2d 103, 386 N.Y.S. 2d 64 (1976).

In considering whether a parent has maintained contact with his or her child, N.Y.S.S.L. §384-b.7(b) provides that the court need not find evidence of insubstantial or infrequent contacts by the parent sufficient, in and of itself, to preclude a finding that a child is permanently neglected. The statute does not, however, describe what constitutes the necessary contact other than to state

> A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contract. S.S.L. §384-b.7(b).

And while the parent may be unable to visit his/her child because of distance and poverty, "the availability of public funds constitutes financial capability from the standpoint of 'permanent neglect'..." Matter of Marilyn H.,

supra; cf. Matter of Wayne T.D., 70 A.D. 2d 617 (2nd Dept. 1979). Similarly, a non-hospitalized mentally ill parent is deemed able to plan, regardless of the severity of the mental illness, Matter of Hime Y, 52 N.Y. 2d 242, 437 N.Y.S. 2d 286 (1981).

The statute defines planning as:

> ...to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent...S.S.L. §384-b.7(c).

Such a plan must also be realistic and feasible and the Court may consider whether the parent failed to utilize services offered to him/her. S.S.L. §384-b.7(c).

While the New York court of Appeals has held that the standards to evaluate the adequacy of the parent's plans should not be set unrealistically high Matter of Orlando F., supra, some Family Courts have refused to to follow this injunction, Matter of Barbara P., 71 Misc.2d 965, 337 N.Y.S.2d 203 (Fam.Ct., N.Y. Co. 1972).

The Court in Matter of Coddington, 84 Misc. 2d 253 (Fam.Ct., Ulster Co.,1975) found a failure to plan where the mother obtained an apartment, but questioned her failed appointments for job training. Finally, a good faith effort to plan is not sufficient to defeat termination, S.S.L.§ 384-b.7(c).

Even if it is found that the parent failed to plan or to maintain contact with the child, the Courts must consider whether the foster care agency used diligent efforts to support and strenghthen the parental relationship, S.S.L. §384-b.7(a). Diligent efforts is defined by S.S.L.§384-b.7(f) as "reasonable attempts" by an authorized agency "to assist, develop and encourage a meaningful relationship between the parent and child" including, consultation with the parents in developing an appropriate service plan and providing visitation and services to facilitate discharge of the child from care.

It is unclear, however, to what extent

a failure to undertake diligent efforts by a foster care agency can defeat a finding of permanent neglect. Where an agency's sole focus was encouraging a child's attachment to foster parents, the New York Court of Appeals held that the lack of diligent efforts prevented a finding. Matter of Leon RR, 48 N.Y. 2d 117 (1979). But, the same court has found that a parent's severe sociopathology can warrant cessation of agency efforts after only 10 months. Matter of Ray A.M., 48 A.D. 2d 161 Aff'd 37 N.Y. 2d 619 (1975). Other Courts have permitted agencies to forego diligent efforts after less than a year of work, or for a period before the filing of a petition, because the chances that continued efforts would be productive were minimal Matter of Karas, 59 A.D. 2d 1022, 399 N.Y.S. 2d 758 (4th Dept., 1977). In sum, no clear standard exists to define to what extent a

foster care agency need provide diligent efforts and under what circumstances it may justifiably withhold services. And even where efforts are made by the foster care agency with a conviction that the efforts will not succeed, such efforts can be deemed sufficient. Matter of Sylvia Clear, 58 Misc. 2d 699 (Fam. Ct., N.Y. Co., 1969), rev.'d sub nom. Matter of Klug, 32 A.D. 2d 915 (1st Dept., 1969), pet. granted on rehearing, Matter of Sylvia Clear, 65 Misc. 2d 323 (Fam. Ct., N.Y. Co. 1970). Further, a petitioning agency need not be faultless in its services but only need provide those services that "on balance" meet its obligations. Matter of Orzo, supra. And in determining such balance the New York Court of Appeals has held that each case must be read upon the "particular facts and the totality of circumstances." In Orlando F., supra. See also, Matter of Derek Denlow, 87 Misc. 2d 910 (Fam. Ct., Kings Co., 1976).

C. THE INTERESTS AT STAKE

The parent's interest

A parent's right to the "companionship, care, custody and management" of his or her minor children has consistently been recognized as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. Stanley v. Illinois, 405 U.S. 645, (1972) Quilloin v. Walcott, 434 U.S. 246 (1978) Parental rights are part of a spectrum of fundamental rights to privacy and autonomy in family life including "marriage,procreation, contraception, family relationships and child rearing and education, "Roe v. Wade, 410 U.S. 113, 152 (1973) (citations omitted), Griswold v. Connecticut 381 U.S. 479, 495 (1965), that have long been held to be protected by the Constitution.

The parent's fundamental interest in his or her relationship with a child is

not diminished simply because parent and child are physically separated from each other by a divorce or by placement of the child in foster care. Smith v. O.F.F.E.R., 431 U.S. 816, 1977, May v. Anderson, 345 U.S. 529 (1953) Armstrong v. Manzo 390 U.S. 545 (1965). Parental rights derive not just from legal or physical custody but from blood relationship, and intrinsic human right. Smith v. O.F.F.E.R., 431 U.S. 816, 846 (1977).

Although custody is generally considered an important aspect of parenthood, Quilloin v. Walcott, 434 U.S. 246, 255,(1978) the biological relationship and the emotional ties which bind parent and child in this most basic of human relationships are of at least equal constitutional significance. Smith v. O.F.F.E.R., 431 U.S. 816, 843-844. The sense of connectedness, belonging, and responsibili actual or potential, which parents feel toward their children is an inherent part of the

parental relationship. It continues whether or not parent and child live together. The parent who has lost custody of his or her child does not stop feeling like a parent. The non-custodial parent's right to maintain a relationship with his or her children, to have access to them and contact with them, to preserve his or her identity as the child's mother or father, remains one of the "intrinsic human rights" which the constitution safeguards. Smith v. O.F.F.E.R., 431 U.S. 816, 845, Caban v. Mohammed, 441 U.S. 380, 385, Quilloin v. Walcott, 434 U.S. 246.

Because it is a final, absolute and irreversible deprivation of one of the most basic of human rights, termination of parental rights is among the most severe penalties which can be imposed upon an individual by the State. It is "extremely harsh" and "contrary to human instincts."

In the Matter of Peter John D.D., 48 A.D. 2d 956, 369 N.Y.S. 2d 232.

> The loss of a child...is a deprivation which can be equated with the imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children.

Davis v. Page, 618 F. 2d 374, (5th Cir. 1980). Imprisonment for a crime usually involves only a temporary loss of liberty. The termination of parental rights is, by its very nature, permanent. It is a kind of death penalty for parents. Catz & Kuelbs, The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings, 13 J. Fam. L. 223, 233 (1974).

The Child's Interest

The state may not argue that it is entitled to dilute the protections it affords parental rights in the name of "balancing" the interests of the parent against the private interests of the child. The interests of both parent and child in a termination proceeding derive from a single

source: the constitutional right, which attaches to the family unit as a whole, and not merely to its individual members, to enjoy family relationships free from state interference. Smith v. O.F.F.E.R. 431 U.S. 816, 850. The right to family integrity encompassses not only the right of parents to raise their children and enjoy their companionship, but also the reciprocal right of the children to be raised, nutured and educated by their parents. Duchesne v. Sugarman, 386 F. 2d 817, 824 (2nd Cir. 1977), Levy v. Louisiana, 391 U.S. 68 (1968), Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd 545 F. 2d 1137 (8th Cir. 1976). The child has as much to gain as the parent from preserving the family relationship, and as much to lose from its destruction.

The State of New York has recognized that "it is generally desirable for the child

to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home." Social Services Law §384-b(1)(a)(ii) (McKinneys 1980).

This Court too has held that the "natural bonds of affection" between parent and child hold the child's best hope for the warm, nurturing, supportive upbringing which is truly in the child's best interests. Parham v. J.R., 442 U.S. 584, 602, Smith v. O.F.F.E.R., 413 U.S. 816, 850. The "affection and concern" of a parent are of tremendous value to a child whether or not the parent actually has custody of the child. Caban v. Mohammed, 441 U.S. 380, 389.

It is precisely because of our faith, as a culture, in the strength and value to children of the emotional ties within

the family that we afford such a high degree of deference and protection to the rights of family members to autonomy within the family unit. Wisconsin v. Yoder, 405 U.S. 205 (1972), Parham v. J.R., supra.

This court has rejected the suggestion that the child has an independent liberty interest in a stable family life which is separable from the interests of the family unit as a whole in remaining together. Smith v. O.F.F.E.R., 431 U.S. 816, 850. The argument that the state may use the preponderance standard to balance the right of the parent to raise the child with the child's right to a stable secure home rests on a number of fallacies.

First and foremost, it assumes at the outset that the natural family has broken down irretrievably. This is the very issue which the permanent neglect proceeding was created to decide. Until there has been a trial

and a judicial determination that a child has been permanently neglected, the state must make precisely the opposite assumption: that the interests of parent and child are the same, and that both have a stake in preserving their family ties. Parham v. J.R. 442, U.S. 584, 610. Any proceeding which, by its design, assumes before a showing of parental unfitness that parent and child are pitted against each other as adversaries intrudes impermissably upon the parent-child relationship. Id.

The second fallacy in the "balancing" argument is that it assumes that after termination of the natural parent's rights, an alternative stable adoptive home will be found for the child. Reality belies this assumption. In New York City in the year ending September, 1979, only about 12% of the children in foster care for whom the agency's goal was adoption were actually adopted. * Almost 40% of the foster children who had been freed for adoption through

termination proceedings of voluntary surrender were still waiting to be adopted, and many of those had waited for years.**

There is a third fallacy in the "balancing" argument. It confuses the issues before the court in the fact-finding stage of a termination (N.Y.F.C.A. §622) with those which arise at the dispositional stage (N.Y.F.C.A.§623). The court at fact-finding does not have before it the issue of where the child is going to live and be cared for after the termination. Under the New York Statute the court is in fact prohibited from considering the "adoptability" of the child when deciding a fact-finding. SSL §384(b)(3)(i).

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* Redirecting Foster Care, A Report to the Mayor of the City of New York, (1980), 69.

**Id. at 43. See also Children Without Homes, Children's Defense Fund (1978), 32.

At the dispositional stage, after there has been a finding of permanent neglect, the court may consider the child's need for a stable home and may "balance" the various alternative dispositions available to the child on an equal basis. The effect of the finding is that parental rights no longer have preferred status, N.Y.F.C.A. §631.

However at the time of the fact-finding hearing there has been no determination that the natural family has irretrievably stopped functioning in a way that benefits the child. At fact-finding, the court must afford to the natural family unit, parent and child, all of the deference and protection which the constitution guarantees and must begin with the presumption that the child's interests will be best served by maintaining his or her ties with

the natural parents.** Stanley v. Illinois, supra.

The State's Interest

This Court has recognized that the state has an interest in the proper upbringing of the children who live within its boarders and will grow up to be its citizens. Wisconsin v. Yoder, 406 U.S. 205, 213. At the same time, as we have discussed above, the Court has consistently held that the state serves its children best by supporting the institution of the family, not by intruding upon the family's realm in the name of "saving" children. The

** This firm dichotomy between the fact-finding and dispositional stages distinguishes this case from Quilloin v. Walcott, supra, and Caban v. Mohammed, supra. In those cases the fact-finding and dispositional functions were collapsed into a single proceeding which combined termination and adoption. Furthermore the cases involved a conflict between two natural parents. The issues, therefore, presented themselves in an entirely different posture.

state's primary interest in matters of child welfare must be the preservation, protection and support of the natural family. Stanley v. Illinois, supra.

Consistent with this rule, the State of New York asserts in its permanent neglect statute that its primary interest in this proceeding is in keeping natural families together wherever and whenever possible:

> "[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."

Social Services Law §384-b(1)(a)(iii). The statute also says that the state has found that children are usually best cared for by their parents and that parents are entitled to care for their own children. Social Services Law §384-b(1)(a)(ii). New York would spite its own primary purpose were it to permit erroneous or unnecessary terminations of parental rights.

The New York statute also asserts, however, that some natural families cannot be preserved and protected without causing harm to their children and that in these cases, the state has an interest, as parens patriae, in dissolving the family in order to protect the interest of the child. Social Services Law §384-b(1)(a)(iv).

A state, in asserting its parens patriae interest, claims a right to stand in the shoes of a child's parents. But the state has no interest whatever in displacing the parent unless and until the parent has been shown to be unfit for continued parenthood.* Stanley v. Illinois, supra, at 657-658. Quilloin v. Walcott, supra, at 255.

*The precise substantive limits on the power of the state to terminate parental rights have not yet been defined by this Court. That was one of the issues not determined in Doe v. Delaware, 49 U.S.L.W. 4250(1981).

In New York, therefore, the state does not have a parens patriae interest in the termination until after a fact-finding hearing has taken place and the parents have been found to have permanently neglected their child. The state's parens patriae interest may not be balanced against the interests of the family at the fact-finding stage in order to arrive at the proper standard of proof because the parens patriae interest does not yet exist at this stage.

Finally, the New York statute asserts that the state has an interest in encouraging the adoption of children in foster care. Social Services Law §384-b(1)(b). This court has recognized that in some circumstances, the state has a legitimate interest in adoption in order to provide "homes to the homeless". Caban v. Mohammed, supra, at 390. It might therefore be a legitimate state interest at the dispositional

stage of a termination proceeding. At fact-finding however, the children involved in termination proceedings are not homeless. They still have a natural family, and the constitutional presumption that the natural family will best provide for them continues to attack to them. The state may not prefer adoption -- an artificial creation of the state, unknown at common law -- to the return of the child to the natural family until and unless the fact-finding court determines that the parents have permanently neglected the child. Stanley v. Illinois, supra.

Until and unless the fact-finding court makes a determination of parental unfitness, the interests of the parents, the child, and the state are all the same: the preservation, protection and support of the natural family.

D. THE RISK OF ERRONEOUS DEPRIVATION

Because of the nature of the permanent neglect statute, N.Y.S.S.L. §384-b.7; N.Y.F.C.A. §§611 et seq., the risk of error in proceedings for termination of parental rights on that basis is extremely high. The "fact-finding" determination required by N.Y.F.C.A. §622 is neither "sharply focused" nor "easily documented," Matthews v. Eldridge, 424 U.S. 319, 343.

The major sources of the risk of error are found in the language of the permanent neglect statute itself, in the imposition of the requirements of that statute on a retrospective basis, and in the gap which exists between permanent neglect as a legal construct and the real situation of parents and their children in the context of the foster care system.

1. The Language of the permanent neglect statute

All of the major elements of the definition of a "permanently neglected child,"

N.Y.S.S.L.§384.7(a)* depend for their meaning on criteria outside the statute itself and, within very broad limits, the criteria may be subjectively determined and applied by the judge to each individual case as he sees fit.

The definitions of "to plan for the future of the child" and of "diligent efforts" provided by S.S.L. §384-b.7(c) and (f) serve to illustrate this point.

In relevant part to "plan for the future of the child" is defined as "to take such steps as may be necessary to provide an

*The definition of "permanently neglected child," as provided in S.S.L. §384-b.7(a) requires consideration of six distinct elements: 1. the alleged failure of the parent "substantially, and continuously and repeatedly" to "plan for the future of the child;" 2. the alleged failure of the parent "substantially, and continuously or repeatedly" to "maintain contact" with the child;" 3. whether the parent was "physically and financially able" to "maintain contact" with or "plan for the future of the child;" 4. whether the child care agency made "diligent efforts to encourage and strengthen the parental relationship;" or 5. dispensed with such efforts because they would have been "detrimental to the best interests of the child;" and 6. whether the parental failure to "maintain contact" or "plan" lasted "more than one year following the date such child came into the care of an authorized agency."

adequate stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible..." S.S.L. §384-b.7(c). What steps may be necessary, what is an adequate stable home, what is adequate parental care, what is a period of time that is reasonable, and what is a realistic and feasible plan are not spelled out by the statute and are left to the court to determine on the basis of unarticulated criteria.

Similarly the definition of the phrase "diligent efforts" leaves it to the invididual judge to determine what are "reasonable attempts" by an agency to "assist, develop and encourage a meaningful relationship between the parent and child." S.S.L. §384-b.7(f). Further, N.Y.S.S.L. §384-b.7(a) leaves it to the individual judge to determine,without any guidelines,whether such diligent efforts were

properly dispensed with by the agency as "detrimental to the best interests of the child." Each of these elements of the permanent neglect statute incorporates but leaves undefined standards for evaluating child care practices and parental attitudes and behavior toward their children.

It has been widely noted that when child placement decisions are based on indeterminate standards, the "decisions reflect the personal biases of judges and appear to result from a disapproval of parents' life styles rather than an impartial judgment that the child would be harmed." Developments in the Law-The Constitution and the Family, 93 Harv. L. Rev. 1156, 1318 n. 60 (1980), and that this is "especially risky when class difference confound the problem." Mnookin, supra at p.269.*

*The risk of error was illustrated by a study of the factors influencing a judge's decision whether to provide a child with services within the child's own home or to remove the child. Three judges asked to make that decision agreed on the disposition in only half the cases and "even in cases in which they agreed on the decision, the judges did not identify the same factors as determinative, each seeming to operate to some extent within his own unique value system." M. Phillips, A. Shyne, E. Sherman, & B. Haring, Factors Associated with Placement Decisions in Child Welfare, 69-84 (1971) at 84.

Indeterminate statutory provisions such as this have been criticized as intrinsically unfair* and as unconstitutionally vague, Doe v. Delaware, 49 U.S.L.W., 4250, 4251 (dissenting opinion, Mr. Justice Brennan); Alsager v. District Court of Polk Co., Iowa, 406 F. Supp. 10 aff'd 545 F. 2d 1137 (8th Cir. 1976); Roe v. Conn., 417 F. Supp. 769 (M.D. Ala. 1976; three-judge court). In applying the void-for-vagueness doctrine this Court has stated that

> "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-109.

*"The use of the indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed. Because of the scope of discretion under such a standard, there is a substantial risk that decisions will be made on the basis of values not widely shared in our society, even among judges." Mnookin Child Custody Adjudication: Judicial Functions in the Face of Inderterminancy, 39 Law & Contemporary Problems 226 (1975) 263.

This description of vagueness is also a description of risk of error. The risk of error through arbitrary and discriminatory enforcement inherent in the phrasing of the permanent neglect statute, N.Y.S.S.L. §384-b.7 may and must be recognized as patent and severe, whether or not the statute is unconstitutionally vague.

2. The imposition of the requirements of the permanent neglect statute retrospectively

In determining whether a child is a "permanently neglected child" the court not only makes a retrospective assessment "about the facts of some earlier event" In re Winship, 397 U.S. 358, 369-70 (1969), but it retrospectively determines, for the first time, what the parent should have done and did not do. In the course of a child's foster placement, parent and agency do not discuss the appropriateness of parental planning, the nature of the agency's diligent efforts, or whether the

diligent efforts will be dispensed with, except in the most casual fashion. The ongoing process of planning and diligent efforts are left to the separate subjective determination of parents and agency.

Although the permanent neglect statute places the burden and responsibility for planning on the parents, in Amici's experience most parents have neither knowledge nor understanding of the concept. Where a child is placed as a result of a child protective proceeding pursuant to FCA Article 10 no individualized notice of the planning requirement is given to the parent at all. In the case of voluntary placements, only recently have the voluntary placement agreements advised parents, albeit in conclusory fashion, that they have an obligation to "plan", N.Y.S.S.L. §384-a. See In the Matter of Roxann Joyce M., 99 Misc. 2d 390, 417 N.Y.S. 2d 396, (Fam. Ct., Kings Co., 1979),

rev'd 75 A.D. 2d 1872, 428 N.Y.S. 2d 264 (2d Dept., 1980).

The agency on the other hand, not only knows what planning is, but is required by law, (18 N.Y.C.R.R. 428. 3(d) and former 18 N.Y.C.R.R. 606.15), to have a written "plan" which in effect defines what the parents' planning efforts should be. Paradoxically, although parents and agency are required by S.S.L. §384-b.7(f)(1) to consult and cooperate in at least some aspect of planning, there is no requirement that the agency's written plan be given to parents. It is Amici's experience that parents are not usually, if ever, given a copy of the agency's own plan.*

Thus, from the outset, the agency has a concrete plan which defines what the parents

*18 N.Y.C.R.R. 428.3(d)(6) gives Social Services districts the option of reviewing the plan with the parent; it doesn't require disclosure of the plan.

are expected to do, but the parents, unaware of the plan or the agency's expectations are pursuing their own course of action.

This anomalous situation is repeated with respect to the agency's diligent efforts. The agency's plan describes the attempts the agency will make to support the relationship between parents and their children in foster care, [18 N.Y.C.R.R. 428.3(d)(3) and former 18 N.Y.C.R.R. 606.15(a)(2),(3),(4)]. The nature of the attempts are a matter of grace on the part of the agency. Amici are convinced on the basis of their experience, that parents are not told and do not know what kind of help the agency can provide and are not given a choice of help and services considered most desireable and suitable by them.**

**Several studies note the failure of social service agencies to "inform...families of available resources" and that "knowledge and use of existing services" by AFDC families was limited. Agency caseworkers themselves have been described as not sufficiently aware of public and private programs and resources available to many of their families. Redirecting Foster Care, A Report to the Mayor of the City of New York (1980) p.14, 33; 600,000 Children, a Report by Citizens' Committee of New York, Inc. (1978) p. 33)

Similarly, an agency decision to dispense with "diligent efforts" as "detrimental to the best interests of the child" is made by the agency unilaterally and is not communicated to the parent contemporaneously. There is no legal requirement that the parent be notified when that decision is made. Usually, in Amici's experience, it is only in the course of the permanent neglect proceedings that the decision is disclosed.

The danger inherent in the retrospective operation of the permanent neglect statute is that norms of planning and diligent efforts can and will be applied after the fact to achieve any desired result. The danger is a genuine one, as only one of the parties, the authorized agency, has effective control and possession of the facts by means of its contemporaneously kept case record (18 N.Y.C. R.R. 428.1, 428.3 and former 18 N.Y.C.R.R. 606. 13); the parent has no comparable evidence to document her version of reality.

3. The gap between the theory of permanent neglect and practice.

The permanent neglect statute, S.S.L. §384-b.7, as a basis for termination of parental rights, by relying on concepts of "planning" and "diligent efforts" attempts to translate certain social work concepts into a legal framework. It rests on a social judgment that parents of children in foster care must help to reunite their families through "planning"* and "that the community is not justified in terminating parental rights in the absence of 'abandonment' unless the community has, through the social agency, sought to reweld the parent-child relationship,"** by its "diligent efforts."

The theory of the permanent neglect statute may be an enlightened one. But it rests on assumptions as to the real situation of parents, children and agencies which cannot survive close scrutiny. The financial, physical and social

*Planning is a basis element of casework practice. Report, Barriers to the Freeing of Children for Adoption, The Temporary State Commission on Child Welfare (March 1976)
**Id. at 23

ability of the parents of children in foster care to maintain contact with them and to "plan" in the social work sense, for their future is far more circumscribed than the statute as written and interpreted allows. Authorized child care agencies are far more stingy in the provision of help and services to these parents than the statute requires.

Thus, in the typical permanent neglect case, the Family Court encounters parents who who are legally but not humanly able to plan and maintain contact and agencies who did not make any serious effort to help the parents. At the same time, the tendency of agencies to keep children in foster care for many years and the consequent estrangement of some of the children from their parents is used an an unwritten mandate for termination. This gap between permanent neglect as a legal construct and the realities which intrude on the actual proceedings, forces a distorted and unfair application of the permanent neglect statute.

As this Court has recognized, " the poor and victims of discrimination" resort to foster care placement in disproportionately large numbers. Smith v. O.F.F.E.R., 431 U.S.816,833. In New York City in 1979, more than 70% of the children in foster care came from families on public assistance,* and over 50% came from female-headed families.** Presently, 84% of the children in the city's foster care population come from minority backgrounds; 56.5% are black and 23% are Hispanic.*** In New York City a black child is three times as likely as a white child to be removed from his family; a Puerto-Rican is twice as likely.**** In New York State 62.2% of the children in foster care were from New York City.*****

*Foundation for Child Development, State of the Child: N.Y.C. II,(1980) 126.
**Redirecting Foster Care, A Report to the Mayor of the City of New York (1980), 6.
***State of the Child: N.Y.C. II,123
****Redirecting Foster Care, 6
*****Foster Care in New YorkCity, Child Welfare Information Service, Inc. (May-June,1978).

New York courts have held that a recipient of public assistance is deemed legally able to plan or visit under the permanent neglect statute, e.g. Matter of Orzo, 84 Misc.2d 482, 374 N.Y.S.2d 554 (Fam.Ct., N.Y. Co.,1975); Matter of Marilyn H., supra. However,for most parents struggling to survive on public assistance, this presumed ability to conform to the requirements of planning and visitation is a legal fiction.

New York's public assistance grant is wholly inadequate in helping families provide for their own needs.* The Consumer Price Index has increased 86% since 1972 when present assistance levels were set.** The non-shelter portion of the AFDC grant for a family of four is only $2.15 per day per person. A single mother whose children are in foster care would only be eligible for home relief and would receive $22.00 per week for basic needs exclusive

*Redirecting Foster Care,p.3
**Id..p.28

of shelter costs.* Moreover, the sharp increase in New York City housing costs forces a substantial number of welfare recipients to use part of their basis needs grant to supplement their maximum shelter reimbursement.**

Under these circumstances, it is almost impossible for parents on public assistance to maintain contact with their children in foster care and to plan in a manner that is "realistic and feasible" under S.S.L.§384-b.7(f).

In Amici's experience, securing appropriate housing is treated as an essential feature of an adequate plan. Yet, when children are placed in foster care, the parent's monthly rent allowance is automatically reduced, often requiring relocation to smaller quarters and causing loss of furniture. Parents are thus caught in the surreal position of not having adequate housing for the return of their children, although it was the children's absence the created the situation.***

*18 N.Y.C.R.R.§352.2
**State of the Child: New YorkCity II,p.60.
***Redirecting Foster Care,p.16.

Parents' financial plight affects their ability to visit their children, as well as to conduct activities considered part of planning. Programs and agency offices are generally not located in the City's poorest neighborhoods.*

The cost of public transportation in New York City ($1.20-round trip) is a substantial burden and can be more so in other localities.**

In addition to the required trips to the agency for visitation, parents must make numerous trips to their welfare center, for counselling sessions, medical and legal services, attendance at Family Court, or searching for decent housing or employment.

The difficulties in planning and visitation caused by the strain of financial circumstances are generally not ameliorated by the help from child care agencies.

*Redirecting Foster Care, p.6
** Report, Barriers to the Freeing of Children for Adoption, p.95

The failure of authorized child care agency staff to provide social work services needed by parents to resolve their problems and facilitate the return of children home, has persisted despite the "diligent efforts" requirement of S.S.L.§384-b.7. Cf. Smith v. O.F.F.E.R., 431 U.816, 833-834. Numerous reasons for the failure have been noted.

A majority of New York Family Court Judges have reported that

> "agencies do not make permanent plans for children in foster care. not try sufficiently to reunite the parent and child. They cite: the failure of agencies to encourage and cooperate in parental visitation: agency failure to assist parents with their problems; the cultural and socio-economic differences between middle-class social workers and underprivileged parents: the bias of some workers against the parents; the conviction of some caseworkers that the interests of children are better served in foster care than in their parents' home. " Report, Barriers to the Freeing of Children for Adoption, supra, p.90.

The reluctance of agencies to develop plans for reunification of children with their

families is in part a reflection of the unavailability of necessary services. Another factor, however, is that the agency may be reluctant to lose the foster care reimbursement payments, which will stop if the child leaves foster care and returns home. The financial implications of decisions with regard to children in foster care are frequently determinative.*

In addition to the class bias noted by the Family Court Judges, racial bias pervades the foster care system, seriously disadvantaging natural parents in termination proceedings under the statutory design.

> "...racism manifests itself in the kinds of services available, the location of the service agencies, the inequitable treatment of minority children within foster care, and the small number of Black and Hispanic directors and staff in child care agencies.**

* Children Without Homes, (Children's Defense Fund, 1978),pp.24-25; The Children of the State II, Annual Report 1976 of the Temporary State Commission on Child Welfare (1976)p.19

** Redirecting Foster Care, p.6

The gap between the legal requirements of the permanent neglect statute and the realities of what parents can do and what help agencies can provide creates intolerable dilemmas for Family Court judges who must apply the statute.

Given the fact that the vast majority of children who are the subject of permanent neglect proceedings have been in foster care for many years, and, are torn between conflicting loyalties to their parents and foster parents, judges are reluctant to leave children in the "limbo of foster care." Consequently, they tend to exaggerate the failure of the parents to plan or maintain contact, and to minimize the agencies' failures to comply with the diligent efforts requirement. They terminate parental rights even as they castigate the agencies. This process of accommodation is discernible from the cases. Matter of Suzanne Y., 92 Misc.2d 652, 401 N.Y.S.

2d 383 (Fam.Ct., N.Y. Co.,1977); Matter of Joyce A.R., 52 A.D.2d 882, 383 N.Y.S.2d 58 (2nd Dep't. 1976); Matter of Donna Doreen G., 70 A.D.2d 188, 420 N.Y.S.2d 576 (3rd Dep't. 1979); Matter of Lisa Ann U., ___A.D.2d___, 427 N.Y.S.2d 994 (3rd Dep't. 1980).

This kind of distorted application of the permanent neglect statute further heightens the risk of error in these proceedings to terminate parental rights and supports the need for a higher standard of proof.

E. THE PROCESS THAT IS DUE

This court drew a clear connection between the standard of proof and the risk of erroneous determinations in Addington v. Texas, 441 U.S. 418, 427 (1978): "Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [decisions will be made]." The same point was made by Mr. Justice Harlan in his concurring opinion In re Winship, 397 U.S. 358, 369-370 (1969).

> [A] standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

Justice Harlan noted that in criminal cases it is of transcending importance that innocent persons not be punished. Therefore the reasonable doubt standard is used even though it increases the likelihood that guilty men may go unpunished, because the risk of erroneously convicting an innocent person is viewed as far more serious than the risk of erroneously acquitting a guilty one.

The "preponderance of the evidence" standard, applied in most civil cases, requires only a finding that the contested fact is more probable than not. In re Winship, 397 U.S. 358, 371 (Harlan, J., concurring); McCormick, Handbook on the Law of Evidence 339, at 793-794 (1972). At least one study has shown that preponderance of the evidence means about a fifty-five percent probability.* This court

*Simon, Rita James and Linda Mahan, "Qualifying Burdens of Proof; a View from the Bench, the Jury, and the Classroom," 5 Law and Society Review 319, 325 (1971).

has found that in applying the preponderance standard the trier of fact makes a finding by merely weighing the quantum of the evidence. In re Winship, supra, at 367. The preponderance standard is used in ordinary civil suits because:

> In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50, (1971).

Applying these considerations to termination of parental rights mandates the use of a higher standard than mere preponderance of the evidence. These lawsuits are not merely cases between two civil litigants over money. Instead the State is attempting to sever all ties between parent and child permanently and irrevocably, to end forever the relationship which

our society deems to be fundamental to the healthy nurturing of its young. Smith v. Organization of Foster Families, 431 U.S. 816; Stanley v. Illinois, 405 U.S. 645, (1972). The consequences to a parent of an erroneous termination of parental rights are of horrifying magnitude.

The consequences of an erroneous determination not to terminate parental rights are far less drastic: the child usually remains in foster care, in the same location and with the same caretakers. The agency must continue to work with the parent. The parent may change his or her behavior and thus regain custody of the child. If not, the agency may bring a new proceeding to terminate parental rights based on new charges.

Obviously, the harm to the parent whose rights are erroneously terminated is far greater than the harm to the state when parental rights are erroneously preserved.

> "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."

Addington v. Texas, supra, at 427. The state must, therefore, prove a termination case by evidence "more substantial than a mere preponderance of the evidence." Id. at 427.

In addition to having less to lose, the state has an easier time proving its case in a termination proceeding than the parent does. Foster care agencies have social workers and other professionals who meet with both parents and children, keep business records of their contacts, and record long-term and short-term plans for parents and children. 18 N.Y.C.R.R. 441.14. The parents have neither professional expertise nor written records of their experience through what may be years of foster care. It is appropriate, therefore to put the heavier burden on the state, since it has more

evidence and expertise at its disposal. Cf. Duchesne v. Sugarman, 566 F. 2d 817, 828, (2d Cir. 1976).

The "clear and convincing evidence" standard of proof is a standard between the preponderance standard used in regular civil cases and the "beyond a reasonable doubt" standard employed in criminal cases. Addington v. Texas, 441 U.S. 418, 423-424 (1979). This standard is used to protect "particularly important interests in various civil cases." Id. 424. This court has repeatedly held that when basic constitutional rights are at stake, the party seeking to interfere with the exercise of those rights, may do so only upon a showing, by clear and convincing evidence, that such interference is warranted. Thus, in Addington v. Texas, 441 U.S. 418 (1979), this Court held that a person can be civilly committed to a mental institution only upon

a showing by clear and convincing evidence that such a deprivation of liberty was necessary. The reasons for this standard were the "weight and gravity" of the individual interest, Id. at 427, the "significant deprivation of liberty," Id. at 425, the "adverse social consequences," and "stigma" the individual would suffer, Id. at 426.

Similarly, in deportation proceedings, this Court has held that because of the precious right at stake, the right to remain in this country, the government must prove its case against the individual by clear and convincing evidence, Fedorenko v. United States, ___ U.S. ___, 101 S. Ct. 737 (1981); and "great tolerance and caution are necessary" in examining the individual's actions before he may be "deprived of the cherished status." Knauer v. United States, 328 U.S. 654, 658, (1946).

In denaturalization cases, a high degree of proof is also required. In Vance v. Terrazas, 444 U.S. 252 (1980) this court ruled

that the standard of proof need not be clear and convincing evidence only because the statute contains its own strict substantive standard of proof: in order to strip a citizen of his citizenship the government must prove that he intended to forego his citizenship. The requirement that specific intent be proved, this Court held, is a sufficiently strict standard to protect individuals from improper or unwarranted deprivations of citizenship. 44 U.S. at 427. In termination of parental rights proceedings, specific intent to forego parental rights need not be proved. On the contrary, the statute explicitly makes parental intent immaterial. Social Services Law §384-b(6)(b).

Furthermore, in a case to terminate parental rights, fundamental constitutional rights are at stake. The right to raise a family is amongst the most prescious rights protected by the Constitution, Stanley v. Illinois, 405 U.S. 645, (1972). A termination of parental rights

under Social Services Law §384-b does not merely impinge on that right, it eliminates it permanently. Because this statute so drastically interferes with so prescious a right, termination of parental rights requires proof by clear and convincing evidence.

The proponents of the preponderance standard assert that a higher standard would be inappropriate because it would not take into account the presence of another party to termination proceedings, the child. It must be noted, however, that Amici do not argue that the criminal standard -- beyond a reasonable doubt -- should apply. The middle standard of clear and convincing evidence is itself a compromise. In fact, in Addington v. Texas, 441 U.S. 418, 429 (1978), this Court applied the clear and convincing standard to a situation in which it recognized competing individual interests, as well as the interest of the State, at stake, namely, the interest

of the individual not to be deprived of his liberty, and the interest of a person suffering from a debilitating mental illness in obtaining necessary treatment.

Perhaps the greatest benefit to be derived from requiring a higher standard of proof in termination cases is the potential effect of the standard on the behavior of foster care agencies. These agencies are in control at all stages of foster care. Their inaction at the beginning of foster care placement leaves children in placement too long and makes it increasingly difficult to reunite with their families. (See, Goldstein, Joseph, Anna Freud, and Alfred Solnit, Beyond the Best Interests of the Child.)

Nonetheless, Amici reject categorically the inherent fallacies that underlie the assertion that the child's interests differ from the parents at the fact-finding stage of a termination proceeding. (See Section C, supra.)

By its decision in this matter this Court can signal its refusal to accept the agencies' inaction. The result would be an unequivocal statement that the State must work to reunite families and that anything less than meeting a high burden of proof will not suffice. Such a ruling would motivate the agencies to offer concrete services to alleviate the problems which caused the children to go into foster care and to speed their return home in every case where that is possible, because this Court has ruled that society cannot tolerate the erroneous termination of parental rights.

CONCLUSION

For all of the foregoing, the judgment of the Supreme Court of the State of New York Appellate Division, Third Department should be reversed.

Dated: May 28, 1981

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Office-Supreme Court, U.S.
FILED
AUG 13 1981
ALEXANDER L. STEVAS
CLERK

No. 80-5889

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNHARDT S. KRAMER, Commissioner,
ULSTER COUNTY DEPARTMENT OF
SOCIAL SERVICES,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Brief of the State of Oregon, Amicus Curiae

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Brief of the State of Oregon, Amicus Curiae

INTEREST OF AMICUS CURIAE

The State of Oregon has termination procedures which are similar in many respects to the procedures New York has enacted. More particularly, Oregon, like New York, allows termination of parental authority when the operative facts are proven by a "preponderance of competent evidence." It is this burden of persuasion that is attacked by petitioners in this case. A similar challenge to the burden of persuasion under the Oregon statutes is now pending before this Court. *Maffey v. State ex rel Juv. Dept. of Klamath Co., No. 80-5227.* Petitioners argue that a "clear and convincing" standard of proof is required by virtue of the Due

Process Clause of the Fourteenth Amendment. Oregon has police power and *parens patriae* interests in the protection of its children. The position taken by petitioners, if accepted, would unbalance the procedural scale heavily in favor of the parents and against the interests of the children.

SUMMARY OF ARGUMENT

On the basis of the Due Process Clause, petitioners seek to impose a "clear and convincing" standard of proof in termination of parental authority cases. It is argued that the standard is required because otherwise a "fundamental" Fourteenth Amendment interest in family integrity would be severed without a sufficient guarantee of the accuracy of that severance.

There are sound reasons for the view that the Due Process Clause of the Fourteenth Amendment was originally conceived to prevent states from arbitrarily restraining the physical freedoms of its citizens. While this original conception of the 'liberty' term has not limited the range of its application by this Court, some trace has survived in the general understanding that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Greenholtz v. Nebraska*, 441 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). It is also reflected in the fact that certain kinds of particularly

stringent procedures have been reserved for cases in which the loss of personal liberty may be a consequence.

A higher standard of proof and a right to counsel are two procedural requirements that have never been constitutionally mandated by this Court in cases which do not threaten loss of physical freedom. Recently, the Court noted that the right to counsel had never been extended to include prosecutions which did not result in the loss of personal liberty. *Lassiter v. Department of Social Services,* — U.S. ——, 68 L. Ed.2d. 640 (1981). The Court nonetheless indicated that the appointed counsel may sometimes be required in termination cases, although there was a presumption against it.

There are important differences between the right to counsel and the right to a clear and convincing burden of persuasion which have a decisive impact on this case. The appointment of counsel promotes fairness and accuracy in nearly all cases. The imposition of a more stringent burden of proof does exactly the opposite, for it weights the factfinding scales in favor of one party to the detriment of the other. In termination cases, a stricter burden of proof means that it is less likely that there will be inaccurate terminations but more likely that there will be inaccurate failures to terminate. If the parents and the state were the only

parties involved in termination cases, such a result might be an acceptable consequence. But it is the children whose relationship with parents is terminated who are most dramatically affected by the process; and it is children who are harmed by an inaccurate failure to terminate. A failure to terminate parental authority does not necessarily return the child to the natural parents. A failure to terminate simply means that the child is left in the position he was in prior to the attempt to terminate. The child is left in foster care or in an institution and must look forward to a continuing process of shuttling from foster home to foster home or from institution to institution. The failure to terminate necessarily means that the child is denied the possibility of adoption. Even if the state, recognizing the futility of proving permanent neglect by clear and convincing evidence, were to throw up its hands and send the child back to the natural family, there is a distinct danger that the child would be further abused or further neglected. The burden of persuasion petitioners seek to impose as a constitutional requirement increases substantially the likelihood of erroneous failures to terminate, with all its consequences. Since the interests of the children are damaged at least as much by an erroneous failure to terminate as are the interests of the parents by an erroneous termination, the imposition of the increased

burden is unacceptable in almost any fair social calculus.

Principles of federalism should also weigh heavily against requiring a heightened burden of persuasion as a matter of constitutional law. Because the full range of procedures leading up to termination of parental authority in any given New York case are complex and entwine removal proceedings, efforts at rehabilitation, procedural safeguards like right to counsel and *de novo* appellate review which are not mandated by the Due Process Clause, as well as relatively closely drawn standards, the presumption of constitutionality which is a major postulate of constitutional adjudication should be granted full force. Further, there is a tradition of deference to state legislative enactments in the family law area.

The dictum of *Addington v. Texas,* 441 U.S. 418, 431 (1979) that, "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold," rightly implies that it is the states, not the courts, that should function as laboratories for social experiment. See, *New State Ice Co. v. Liebman,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Mandating a clear and convincing standard of persuasion would be more a matter of secreting substantive law in

the interstices of procedure than imposing procedural safeguards; and it would impose an unnecessary rigidity on a process that must remain sensitive to a bewildering array of interests. The assumption that states are insensitive to the protection of parental interests in termination proceedings is the unspoken predicate of petitioners' case for the clear and convincing standard. An analysis of the procedures and safeguards built into the New York termination scheme thoroughly rebuts that assumption and this Court should not indulge it.

ARGUMENT

The sole issue in this case is framed in the abstract. Petitioners contend that §622 of the New York Family Court Act (F.C.A.) is unconstitutional under the Due Process Clause of the Fourteenth Amendment because it permits a finding of the requisite facts to permanently terminate the parent's or other custodian's custody, F.C.A §614(1), by a "fair preponderance of the evidence." Petitioners have not claimed, or have apparently not claimed, that the preponderance standard violates the Due Process Clause because, viewed in light of the entire New York termination procedure, the standard is unfair or does not provide that process which is due. They have not asserted that any other aspect of the New York procedure; the preponderance

standard for removal,[1] for instance, or the substantive standards for termination, F.C.A § 614, violates due process or is otherwise unconstitutional. And they have not argued that the standard of proof prescribed by the New York statute is unconstitutional as applied. The contention is that the preponderance standard of proof for termination, examined in isolation and in all cases, is invalid because the Fourteenth Amendment demands a more stringent standard, proof by clear and convincing evidence. If the claim is upheld, at least six statutory standards for proof of termina-

[1] The distinction and interrelation between the removal proceeding, often call a dependency proceeding, and the termination proceeding is critical to an assessment of the claim in this case. See, Comment, Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing," 14 San Diego L. Rev. 1155 (1977). A removal proceeding, which may lead to the placement of the child in an institution or foster care after a finding of abuse or neglect, may not, in New York, have the consequence of terminating parental rights. F.C.A. §§1052, 1055. A permanent termination proceeding is to terminate the relations between a parent and "a person . . . who is in the care of an authorized agency, either in an institution or in a foster home." F.C.A §611. The disposition at a termination proceeding, therefore, determines the relationship between the parents and children who have already been removed from the home and placed in an institution or in foster care. Termination may not occur less than one year following removal. F.C.A. §614(1)(d). A child may also be placed voluntarily in an institution or in foster care. For a fairly recent description of procedures, *see Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). It is of importance to this case that it be made clear that a failure to terminate does not lead to the placement of the child in parental custody unless the court rules favorably on a motion to reconsider the underlying order of placement, F.C.A. §632(b), and it is very unlikely that such a motion would receive a favorable treatment when the state has brought a case alleging permanent neglect. An order of termination, of course, anticipates adoption.

As Michael Wald points out, a termination following an initial finding of neglect is rare even in those states which, by statute, allow it. Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L.Rev. 623, 634 (1976). New York has codified the right of parents to rehabilitate the family.

tion will fall, regardless of the procedural schemes in which they are embedded.[2]

The Due Process Clause of the Fourteenth Amendment commands that, 'No State shall . . . deprive any person of life, liberty, or property, without due process of law." As this Court observed in *Lassiter v. Department of Social Services, supra,* its decisions have "by now made plain beyond the need for multiple citation that a parent's desire for the right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful contervailing interest, protection.' *Stanley v. Illinois,* 405 U.S. 645, 651 (1972)." *Id.,* 68 L. Ed.2d., at 649-50. Those protections have been both procedural and substantive. *Smith v. Organization of Foster Families, supra,* 431 U.S. at 842. The view that the Due Process Clause imposes substantive limits on the capacity of legislatures to enact valid legislation has drawn substantial criticism, especially in that area Professor Ely has called "the sex-children cluster." *See,* J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Ely, The Wages of Crying Wolf: A Comment on *Roe v.*

[2] Ariz. Rev. Stat. Ann. § 8-537B (1974); Colo. Rev. Stat. §19-3-106(6)(a) (1978); Idaho Code §16-2009 (1979); Ky. Rev. Stat. §199.603(1) (Supp. 1978); N.Y. Family Ct. Act §622 (McKinney 1975); Ore. Rev. Stat. §419.525(2) (1979). The preponderance standard had been judicially imposed in other states. *See, e.g., In re Fritz,* 460 Pa. 265, 333 A.2d. 466 (1975); *In re Winger,* 558 P.2d. 1311 (Utah 1976).

Wade, 82 Yale L. J. 920 (1973); Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976). According family interests procedural protections has not elicited comparable comment, for the obvious reason that procedure is the subject of the language of the Due Process Clause. But it is not at all obvious that family interests invoke the "liberty" term of that Clause, at least as it was originally understood. *See, e.g.*, Shattuck, The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty and Property,' 4 Harv. L. Rev. 365 (1891); Warren, The New 'Liberty' Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926); R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977); J. Ely, Democracy and Distrust: A Theory of Judicial Review 192 n. 28 (1980).

The argument that the Due Process Clause was only intended to protect against restraints of personal liberty, or physical restraints, is based on the history of its language and is not without a certain force. The argument is not harmed by the fact that a broad reading of the liberty term must mean that the state cannot enact legislation or proceed administratively in any way that restricts or classifies without also providing procedures. Such a reading would turn the Due Process Clause "into a virtual engine of destruction for

countless legislative judgments." *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). A middle ground, interpreting "liberty" to encompass interests protected by the Bill of Rights and any other interests which can be identified as "fundamental" under some unspecified scheme of values, is difficult to justify as a matter of theory. *See*, Ely, Foreward: On Discovering Fundamental Values, 92 Harv. L. Rev. 5 (1978).

While state intervention into the family to terminate parental relations may impinge upon a broadly conceived liberty interest of the parents, it does not involve that physical restraint which is the core value of the "liberty" term of the Due Process Clause. We do not here argue that termination does not require procedural safeguards under the Fourteenth Amendment. It would be hopeless to do so in the face of such a wide and deeply held current of precedent. But it should be emphasized that the parental interest at stake in these proceedings has already been compromised by removal or voluntary placement and attenuated by separation for at least one year. Even if the family unit had remained intact, the tiered approach to procedural protections implicit in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and developed more expressly in subsequent cases, suggests that the extraordinary process due when the loss of physical liberty

may be a consequence does not necessarily follow when those concerns are not threatened.

Mathews v. Eldridge is largely a summation and crystalization of due process principles found in prior cases. It describes factors which are appropriately considered and balanced in the flexible calculus to set fair procedure in a particular case:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 334-35.

Assessing the private interests, the first case to follow *Eldridge* and apply its balancing test intimated that a constitutional hierarchy of values was relevant:

> "But even if the property interest claimed here is to be compared with the liberty interest at stake in [*Morrissey v. Brewer*, 408 U.S. 471 (1972)], we note that both the 'risk of an erroneous deprivation' and 'the degree of potential deprivation' differ in a qualitative sense and in degree from those in *Morrissey*." *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 495 (1976).

Hortonville involved a questionable claim to a property interest. In *Morrissey* the interest, while qualified

by a parole status that need not have been granted by the state at all, was an interest in freedom from physical restraint in the form of incarceration; an interest which the Court identified as "includ[ing] many of the core values of unqualified liberty." *Morrissey v. Brewer,* 408 U.S., at 482.

Marked as they are by an overriding concern for flexibility and fairness, *see, Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961), the cases applying the Due Process Clause have few absolute rules. But the fact that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *Greenholtz v. Nebraska Penal Inmates, supra,* 442 U.S., at 18 (Powell, J., concurring in part and dissenting in part) is reflected in the language and the disposition of the cases

Without too great a strain, the due process cases treating liberty interests may be seen as presenting a pattern in which the closer the potential deprivation approaches the "core concern" of freedom from physical restraint, the more stringent are the requirements for those procedures designed to promote accuracy, at least where the freedom was unqualified in the first instance. The exceptions to this pattern have been based on particular historical traditions, a consideration not cataloged in *Eldridge.* In *Ingraham v.*

Wright, 430 U.S. 651 (1977), the Court declined to impose stringent procedural safeguards prior to school discipline, even though some physical restraints inhered, because of historical considerations:

> "If the common-law privilege to inflict reasonable corporal punishment in school were inapplicable, it is doubtful whether any procedure short of a trial in a criminal or juvenile court could satisfy the requirements of procedural due process for the imposition of such punishment." *Id.,* at 674 n. 44.

Similarly, in *Parham v. J.R.,* 442 U.S. 584 (1979), a central element of the argument for informal procedures when parents sought to commit a child to a mental institution was the tradition of broad parental authority over minors, although there the argument from tradition was coupled with the deference to professional expertise. The theme of tradition was sounded in a particularly vivid way by Justice Stewart, concurring. *Id.,* at 621-25 (Stewart, J., concurring).

The general principle that the restraint of an unqualified personal freedom triggers stringent procedures is most clearly evidenced in cases in which the claimant sought the procedural protections traditionally associated with criminal trials, like the right to counsel and a heightened burden of persuasion. *Addington v. Texas, supra,* the only case to impose a clear and convincing burden of persuasion on constitutional grounds, stresses that "civil commitment for any pur-

pose constitutes a significant deprivation of liberty that requires due process protection." *Id.*, 441 U.S., at 425. In *Vance v. Terrazas*, 444 U.S. 252 (1980), the Court declined to impose the clear and convincing standard in an expatriation proceeding precisely because physical liberty was not threatened:

> "We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Addington v. Texas*, 441 U.S. 418 (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa v. United States, supra.* But expatriation proceedings are civil in nature and do not threaten a loss of liberty." *Id.*, at 266.

The Court did not hold that the clear and convincing standard was inappropriate because no liberty interest was affected. The standard was inappropriate because the *loss* of liberty was not threatened and the weight of tradition was against it.

Most recently, this Court expressly marked the distinction between the loss of physical liberty and other liberty interests in calibrating the procedures required in a termination case. In *Lassiter v. Depart-*

ment of Social Services, — U.S. ——, 68 L. Ed.2d. 640 (1981), Ms. Lassiter claimed that because she was indigent, the Due Process Clause entitled her to the assistance of appointed counsel. The right to counsel is, of course, a much more important (and less mechanical) right than the right sought here. Justice Stewart, writing for the majority, surveyed the cases in which appointed counsel had been required and observed that, "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.,* 68 L. Ed.2d., at 648. *Lassiter* noted that as a litigant's interest in personal liberty diminishes so does his right to appointed counsel and pointed to the fact that previous decisions had declined to extend the right to include prosecutions which did not result in the loss of personal liberty. The Court then converted the "pre-eminent generalization" into a presumption:

> "In sum, the Court's precedents speak with one voice about what 'fundamental fairness,' has meant when the Court has considered the right to appointed counsel; and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured."

Lassiter weighed the three *Eldridge* factors against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty to see if the presumption was rebutted. The Court did not "attempt to formulate a precise and detailed set of guidelines to be followed," *Id.*, at 652-53, in determining whether counsel must be appointed, but, in denying the necessity of appointed counsel for Ms. Lassiter, it assessed the facts.

In this case, as in *Lassiter*, the petitioner seeks to impose a procedural requirement traditionally associated with the potential loss of personal liberty in a proceeding which does not threaten such a loss. In theory, this case is distinguishable from *Lassiter* only in that the right to a more stringent burden of persuasion is more problematic than the right to appointed counsel. The appointment of counsel undoubtedly promotes fairness and accuracy in any litigation, albeit at great cost. It is not clear; indeed it is unlikely, that a more stringent burden of persuasion does so in termination proceedings.

The function of legal process is to minimize the risk of erroneous decisions. *Addington v. Texas, supra,* 441 U.S. at 425. It has been stated that the function of the standard of proof conflates with the function of process generally in that it is "to instruct the factfinder concerning the degree of confidence our society thinks

he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S., 358, 370 (1970) (Harlan, J., concurring). But this cannot be entirely true, for the standard of proof only helps ensure the accuracy of a *particular* finding.[3] In the criminal trial context, the beyond a reasonable doubt standard protects against inaccurate convictions, not acquittals. In termination cases, a higher standard of proof would, presumably, protect against inaccurate terminations. But it would not protect against, and would in fact tend to promote, inaccurate failures to terminate. It should be obvious that the erroneous failure to terminate may have a substantial adverse impact on the interests of the child. An erroneous failure to terminate leaves the

[3] While that portion of Justice Harlan's concurring opinion quoted above is often cited in isolation, the context of his discussion makes it clear that Harlan was fully aware of the point we are making:

"A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." *In re Winship, supra*, 397 U.S., at 370-71 (Harlan, J., concurring).

child in foster care or an institution; and it means that the child cannot acquire family stability by adoption. An erroneous failure to terminate may also cause the state, if it gives up on the process, to return the child to a potentially abusive or neglectful family. A failure to terminate *does not* return the child to the natural family.

In termination cases particularly, the more appropriate view of the function of the standard of proof is that it simply allocates the risk of error between the parties.

It is the distinctive feature of termination cases that there are three interested parties, not two. Therefore the usual interest balancing model for allocating risk between the state and a private party is inapplicable. That the child in termination cases has a very strong interest which may diverge from that of the parents is widely recognized. *See generally,* Goldstein, Freud, & Solnit, Beyond the Best Interests of the Child (1973); Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L. J. 887 (1975); Foster & Freed, A Bill of Rights for Children, 6 Fam. L. Q. 343 (1972). The central policy of the New York system is to promote the best interests of the child, *Smith v. Organization of Foster Families, supra,* 431 U.S., at 823; F.C.A. §614(e); Soc. Serv. Law §384-

b(1)(a)(ii) (McKinney Supp. 1976-1977). That policy is expressed in the statutes and case law of many states. *See, e.g.,* Or. Rev. Stat. 419.474(2); *Wasson v. Wasson,* 92 N.M. 162, 584 P.2d. 713 (Ct. App. 1978); *State v. McMaster,* 259 Or. 291, 486 P.2d. 567 (1971); *In re B.E., B.L., & L.S.M.,* 287 N.W.2d. 91 (S.D. 1979); *In re S.J.,* 576 P.2d. 1280 (Utah 1978). In another context, this Court has stated:

> "The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent.* There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitance would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." *Wyman v. James,* 400 U.S. 309, 318 (1971).

The child's interest, therefore, should at least not be relegated below that of the parents.

The fact that there is a triad of overlapping and conflicting interests involved in a termination proceeding would pose extreme difficulty for the proponents of the clear and convincing standard even in the absence of a strong and principled tradition reserving heightened burdens of persuasion for cases in which the loss of personal liberty may occur. If the purpose of the burden of proof is to allocate the risk of error and

the higher standard is imposed when "one party has at stake an interest of transcending value," *Speiser v. Randall,* 357 U.S. 513, 525-25 (1958), then the stricter standard cannot be imposed in termination cases; cases in which the competing interests are not only fundamentally ambiguous but often in equipoise. That there are three distinct interests involved in a termination proceeding is almost universally agreed. *See,* Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L.J. 887, 890-94 (1975); Note, Involuntary Termination of Parental Rights: The Need for Clear and Convincing Evidence, 29 Am. U. L. Rev. 771, 776-77 (1980). This fact is made most clear in those states that adopt the view that the best interest of the child should control. It is also reflected by the fact that many states provide for appointed counsel for both the parents and the child. *See, e.g.,* F.C.A. §§ 1043(a); 241-49; Or. Rev. Stat. 419.498(2); *State ex rel Juv. Dept. v. Wade,* 19 Or. App. 314, 527 P.2d. 753 *rev. den.* (1975).

The tripartite relationship of interests to be considered in any termination proceeding led the Arizona Court of Appeals to assess the matter in the following, Harlanian, terms:

> "In a termination proceeding an error in factual determination can result in the termination of the parental relationship when such termination is not

> justified. On the other hand it can result in the failure to terminate when the relationship should be ended. The standard of proof is going to affect the relative frequency of those two erroneous outcomes. The standard of 'a preponderance of the evidence' would result in a greater risk that parental rights would be erroneously severed, but a smaller risk that a child, as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes. Comparing the social disutility of these two erroneous outcomes, we do not believe that one can make a *fundamental* value determination that the erroneous severance of parental rights, vis-a-vis the erroneous failure to sever, constitutionally requires a higher burden of proof." *Hernandez v. State ex rel Arizona Dept. of Econ. Sec., 23 Ariz. App. 32, 530 P.2d. 389, 393 (1975).*

The reasoning of the Arizona Court points directly at the primary reason for failing to impose the clear and convincing standard— the fundamental recognition that weighting the factfinding process in favor of the parents may harm the child by ensuring that he remains in foster care, or in an institution, without the possibility of adoption. There is also the danger, of course, that the state will respond to the inability to prove permanent neglect by clear and convincing evidence by returning the child to an abusive natural family. But in the ordinary case the state will most likely maintain the *status quo ante,* a distinctly unhappy solution from an adoptable child's point of view.

The statement in *Hernandez* rests primarily on the structural fact that there are three potentially conflicting sets of interests. An analysis of those interests, or even a mere cataloguing of those interests, demonstrates that no one party can claim a transcendant value at stake in these very murky and very human circumstances. All of the parties in a termination proceeding have an interest in maintaining, or establishing, in the absence of a communal child raising policy, a viable natural family unit; and all of the parties have an interest in avoiding, whether they express it or not, a family environment that is abusive or neglectful. But between these extremes, and sometimes even at the extremes, the interests will diverge and equivocate.

The child has an interest in receiving the care and training necessary to develop into a well adjusted adult, especially in circumstances where psychological literature shows how crucial as well as how short the effective time is for intervention. *See,* Wald, State Intervention on Behalf of Neglected Children, *supra.* The child also has an interest in the integrity of the natural family. But perhaps the child's most important interest is in avoiding an extended series of foster care placements or institutionalizations and in avoiding placement in the natural family when he is likely to be abused or neglected. The parents have an inter-

est in the maintenance of the family unit, which may include the right to the care, custody, and control of the child; the right to discipline the child and the right to control the child's religious and moral education. The state has *parens patriae* interests and police power interests in both the welfare of the child and the growth of a healthy and stable emerging population. These basic interests, and they are by no means exhaustively listed, will merge and converge, strengthen and weaken, as the factual settings vary.

To the practical fact that there are no unambiguous transcendent interests at stake which must be protected by a stricter standard of proof must be added the additional practical fact that the evidence in termination cases will ordinarily be framed in terms of probabilities. The point of the termination inquiry is usually, as in New York, predictive; do the best interests of the child warrant termination? The evidence necessary to establish a given conclusion will ordinarily be in the form of opinion testimony by psychiatrists, social workers, and other experts. The practical evidentiary difficulties which weighed heavily against imposing a beyond reasonable doubt standard of proof in *Addington*[4] should also weigh against the imposi-

[4]"Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question — did the accused commit the act alleged? There may be

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tion of the clear and convincing standard for terminations.

Though they have seldom been afforded what we might consider appropriate influence in Due Process cases, principles of federalism should also weigh against invalidating state statutes that allow termination of parental rights and duties by a preponderance of the evidence. This Court has, on occasion, expressed a deference to state legislation involving family interests.

In *United States v. Yazell,* 382 U.S. 341 (1966) the United States attempted to avoid the effect of a Texas coverture statute. The Court declined to override state law in part because of a sensitivity to federal-state relations where family laws were concerned.

> "We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests require overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substan-

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factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas, supra,* 441 U.S. at 429.

> tial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Id.*, at 352.

This "traditional" solicitude for state legislative enactments in the field of family law is buttressed by an even older and more secure tradition. Seldom cited in Due Process cases, the presumption of the constitutionality of state laws, "which is the postulate of constitutional adjudication," *People of State of New York v. O'Neill,* 359 U.S. 1 (1959), should be allowed its full force in cases like this, where the statutes are procedurally involved and interwoven, the private interests obscure, and the constitutional claim doubtful at best. *See, Parham v. Hughes,* 441 U.S. 347, 351-52 (1979); *People of State of New York v. O'Neill, supra; Davis v. Dept. of Labor and Industries of Wash.,* 317 U.S. 249 (1943).

An appreciation for the importance of federal-state relations recently led this court to remark, with respect to procedurs, that, "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas, supra,* 441 U.S., at 431. To the extent the argument for imposing a clear and convincing standard has not already been interred by the considerations sketched above, this "essence of federalism" should be decisive.

The procedures established by the states for the termination of parental custody are multifaceted, intertwined, and ordinarily strung over a lengthy period of time in any given case. Those procedures may require very stringent safeguards at some points and relaxed safeguards at others. The procedural scheme might, for instance, as in New York, require appointment of counsel for all private parties and not allow immediate termination to follow a finding of dependency for abuse or neglect. These strict procedural impediments to termination might justify more elusive standards for the ultimate inquiry. Or very narrowly drawn standards for termination may justify immediate action terminating parental custody when those standards have been violated. Again, a procedure which, like New York's, mandates extensive and long lasting efforts by social agencies to rehabilitate the natural family and *de novo* review may justify a relaxation of some other element of the procedural corpus. So long as the procedural scheme is not manifestly unfair when considered as a whole, and this one plainly is not, the states should be allowed to function freely as laboratories for social experiment. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).[5]

[5] See also, Missouri, Kansas, & Texas Railway Co. of Texas v. May, 194 U.S. 267, 270 (1904) (per Holmes, J.):

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It cannot be assumed that the states are insensitive to parental interests in termination proceedings. Any fair analysis of New York's procedural scheme, or that of the State of Oregon, for that matter, refutes such an assumption. The statutes are not drawn to minimal constitutional limits. They evidence clearly an attempt to accomodate the parents and rehabilitate the family. In this context, to isolate and declare that a particular standard of proof is constitutionally mandated procedure is shortsighted and unnecessarily rigid. It is more a matter of secreting substantive law in the interstices of procedure than imposing procedural safeguards. If the burden of persuasion is to be weighted heavily in favor of the parents, the state's obligation to the child must find new methods of expression. Those expressions may, in an effort to regain an essential and delicate balance, end in a procedural framework that is awkward for all parties.

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"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Quoted in F. Frankfurter, The Public and Its Government 76 (1930).

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of the State of New York should be affirmed.

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